United States Court of Appeals for the Second Circuit



APPENDIX

74-1559 B

United States Court of Appeals for the second circuit

VANITY FAIR MILLS INC.,

Plaintiff-Appellant,

against

OLGA COMPANY (INC.),

Defendant-Appellee.

On Appeal from the United States District Court, For the Southern District of New York.

JOINT APPENDIX

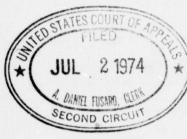
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67 Civ 4181

VANITY FAIR MILLS INC.

vs.

OLGA COMPANY, INC.

JUDGE GRIESA

D	ATE	PROCEEDINGS
Oct.	27-67	Filed complaint and issued summons. (Mailed Notice to Pat. Comm.)
Oct.	27-67	Mailed Notice to Patent Commissioner.
Nov.	21-67	Filed summons & return, served Olga Co. by P. Carter 11-8-67.
Nov.	28-67	Filed deft's Answer & counterclaim.
Dec.	13-67	Filed Reply to deft's. counterclaim.
Dec.	15-67	Filed deft's interrogatories to pltff.
Dec.	20-67	Filed stipulation and order extending plaintiff's time to object, etc. with respect to deft's. interrogs. to 1/16/68, etc. Palmieri, J.
Jan.	31-68	Filed Plaintiff's Answers to Defendant's Interrogatories.
Jun.	12-68	Filed defendant's notice of motion for protective order, ret. 6-20-68.
Jun.	12-68	Filed defendant's affidavit in support of motion.
Jun.	12-68	Filed affidavit of Jan J. Erteszek.
Jun.	12-68	Filed defendant's memorandum in support of motion.

DATE	PROCEEDINGS
Jun. 17-68	Filed stip. & order adjourning taking of deposition of Olga Erteszek notice for 6-11-68 to a time agreed upon following the Court's ruling upon a motion under Rule 30(b),—Motley, J.
Jun. 20-68	Filed memo endorsed on motion filed 6-12-68 —Motion withdrawn by stipulation attached—Frankel, J.
Jun. 20-68	Filed stip. & order as indicated.—Frankel, J.
Oct. 18-68	Filed deft's notice of taking deposition of officers & agents indicated.
Oct. 18-68	Filed deposition of Robert Whitney Drayton, taken 7-23-68. mn
Oct. 18-68	Filed deposition of Timothy Joseph Lind- gren, taken 7-23-68. mn
Oct. 18-68	Filed deposition of Olga Erteszek, taken 7-23-68. mn
Feb. 27-69	Filed defts. Note of Issue and Statement of Readiness.
Mar. 7-69	Filed pltffs. Objections to placing the Cause on the Calendar.
Mar. 14-69	Filed stip. and Order—pltff. withdraws its opposition to placing this cause on the calendar. Pltff. withdraws its Notice of Taking depositions dated March 6, 1969. Defts. agrees that Mr. & Mrs. Erteszek will make themselves available for a deposition in New York City on the occasion of their next business trip.—so ordered Lasker, J.

D.	ATE	PROCEEDINGS		
Sep.	29-69	Filed order purs. to cal. rules 6 and 13. Sugarman, Ch. J.		
Oct.	2-69	Filed pltff's designation of trial counsel.		
Oct.	3-69	Filed deft's designation of trial counsel.		
Oct.	28-69	Pre-trial-McGohey, J.		
Oct.	28-69	Filed pltff's affidavit & Notice of Motion to extend time to file pltff's pre-trial memorandum, to 11-14-69.		
Oct.	28-69	Filed Memo Endorsed on pltff's motion to extend time to file pre-trial memo to 11-14-69—filed 10-28-69—Motion granted. So ordered—McGohey, J.		
Oct.	28-69	Filed deft's affidavit & notice of motion to extend time to file pre-trial memorandum to 11-14-69.		
Oct.	28-69	Filed Memo Endorsed on deft's motion filed 10-28-69—Deft's motion to extend time to file pre-trial memo to 11-14-69 is granted. —So ordered—McGohey, J.		
Oct.	28-69	Filed deft's response to pltff's motion to extend time.		
Dec.	8-69	Pre-trial—Lasker, J.		
Dec.	10-69	Filed pltff's supplemental pre-trial memorandum.		
Apr.	7-70	Filed pltff's pre-trial memorandum.		
Apr.	8-70	Filed deft's supplemental pre-trial memorandum.		

DATE		PROCEEDINGS	
Apr.	8-70	Filed deft's pre-trial memorandum.	
Apr.	8-70	Filed consent pre-trial order.—So ordered.—McLean, J.	
Apr.	8-70	Filed stip. & order substitution of atty. for deft.—White & Coch—So ordered—Clerk.	
Feb.	1-72	Filed depositions of Allen Bradford Magill, Donald Francis Hoopes & Frederic Eaton, witnesses taken on 11-14-68 by deft. m/n	
Jan.	26-73	Filed Plaintiff's Pre-Trial Brief.	
Jan.	29-73	Before Griesa, J. Trial begun.	
Jan.	30-73	Trial continued.	
Feb.	1-73	Trial concluded. Decision Reserved.	
Feb.	27-73	Filed Plaintiff's Post Trial Brief.	
Apr.	19-73	Filed transcript of the record of proceedings dtd. $1/29/73 \& 1/30/73 \& 2/1/73$.	
Jan.	8-74	Filed Opinion #40,191—Vanity Fair's complaint charging the invalidity of Olga patents 3,142,301 and 3,142,300 should be dismissed. Olga is entitled on its counterclaim, to a declaration of the validity of the patents and an injunction against Vanity Fair prohibiting further infringement. Olga is further entitled to damages in accordance with this opinion. The parties	

should settle the necessary order and judg-

ment-Griesa, J.

DATE

PROCEEDINGS

Jan. 24-74 Filed Judgment #74,102—that deft. Olga Co. recover of pltff. the sum of \$31,000., as damages pursuant to 35 U.S.C. Sec. 284 for said infringements, with interest at 6% from 1-1-66—that the complaint for a declaratory judgment is dismissed—deft's counterclaim is sustained—judgment consentéd to—Griesa, J.

Judgment entered-Clerk-ent. 1-24-74.

- Jan. 24-74 Mailed Notice to Patent Commr.
- Feb. 21-74 Filed plaintiff's notice of appeal from judgment entered. m/n
- Feb. 21-74 Filed bond undertaking appeal for \$250 (The Travelers Indemnity Co. Bond No. 923A893.
- Feb. 21-74 Filed stip. & order that the execution of the damage award and the enforcement of the injunctive provisions of the judgment herein be stayed pending the final determination of pltff's appeal—Griesa, J.
- Feb. 22-74 Filed Amended Opinion #40,191—Vanity Fair's complaint charging the invalidity of Olga patents 3,142,301 and 3,142,300 should be dismissed. Olga is entitled, on its counterclaim, to a declaration of the validity of the patents and an injunction against Vanity Fair prohibiting further infringement. Olga is further entitled to damages in accordance with this opinion—Griesa, J.

DATE

PROCEEDINGS

- Filed order that the opinion of 1-8-74 is Feb. 22-74 amended to omit the portion commencing on page 23 with the words "In Aro, Manufacturing Co." to the end of page 25. The omitted portion concludes with the words "a lost profit of about \$31,000." The 2nd paragraph of page 26 is omitted and is replaced with the paragraph Olga concedes that any lost profits did not exceed this royalty figure. Thus the amount of damages awarded from 1-1-68—the median point for the infringement. Paragraph 5 of judgment of 1-23-74 is amended to replace the figure \$31,000 with the figure \$28,024 and to replace the date Jan. 1, 1966 with the date Jan. 1, 1968. So ordered-Griesa, J.-mailed notice.
 - 3-19-74 Filed amended notice of appeal by plf. from amended judgment entered in this action on Feb. 21-74. m/n

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

VANITY FAIR MILLS INC.,

Vanity Fair Mills Inc.,

Vanity Fair Mills Inc.,

Plaintiff,

V.

Olga Company (Inc.),

Defendant.

DECLARATORY JUDGMENT COMPLAINT

- 1. Plaintiff, Vanity Fair Mills Inc. (hereinafter referred to as "Vanity Fair") is a Pennsylvania corporation, having its principal place of business at Reading, Pennsylvania, with an office and place of business at 640 Fifth Avenue, New York, New York.
- 2. Defendant, Olga Company (Inc.) (hereinafter referred to as "Olga") is a corporation organized and existing under the laws of the State of California, duly licensed to do business and is doing business in the State of New York, and maintains a place of business at 45 Park Avenue, New York, New York, within the jurisdiction of this Court.
- 3. This is an action for Declaratory Judgment under Sections 2201-2202, Title 28, United States Code, adjudging certain patents of the United States to be invalid and not infringed by the plaintiff, Vanity Fair. This Court

has jurisdiction under Section 1338, Title 28, United States Code. Venue is found on Section 1391(b) and 1391(c) Title 28, United States Code.

4. Defendant, Olga, is the owner of the following United States patents:

Patent No.	$Date\ of\ Issue$	Patentee
3,142,300	January 28, 1964	Olga Erteszek
3,142,301	July 28, 1964	Olga Erteszek

- 5. Plaintiff, Vanity Fair, has been and is presently engaged in the manufacture, sale or distribution of ladies' undergarments throughout the United States.
- 6. Defendant, Olga, has made charges in writing against plaintiff, Vanity Fair, to the effect that the manufacture, sale or distribution of certain ladies' undergarments within the United States will constitute infringement of the aforementioned patents and one or more of the claims of each thereof.
- 7. Plaintiff, Vanity Fair, denies the manufacture, sale or distribution of said ladies' undergarments within the United States by Vanity Fair, or its customers, or any one, does or will infringe or violate any of said defendant's Olga, rights under any one or both of the aforesaid patents and asserts that plaintiff, Vanity Fair, and its customers, or any one, are entitled to sell and distribute said ladies' undergarments without interference by defendant, Olga.
- 8. An actual controversy has arisen and exists between the parties as to the validity of each of the aforesaid patents and the alleged infringement by the manufacture, sale or distribution of plaintiff's Vanity Fair, said ladies' undergarments.

- 9. Each one of the aforesaid patents is invalid and void for the reasons stated below:
 - (a) Because prior to the alleged inventions by the named applicant for each of the said patents, or more than one year prior to the dates of the applications for each of said patents, the alleged inventions were patented or described in printed publications in the United States or in foreign countries;
 - (b) Because the named applicant for said patents was not the original or first inventor or discoverer of the alleged inventions purporting to be patented therein, but the same had previously been devised by others;
 - (c) Because prior to the alleged inventions by the named applicant for said patents said alleged inventions had been known to or used by others in the United States;
 - (d) Because for more than one year prior to the filing of the applications for said patents in the United States, the alleged inventions, or all material or substantial part or parts thereof, had been in public use or on sale in this country;
 - (e) Because the alleged inventions of said patents were described in patents granted on applications for patents of others filed in the United States before the alleged invention thereof by the applicant for the aforesaid patents;
 - (f) Because prior to the alleged invention by the named applicant for said patents, the alleged inventions were made in this country by others who had not abandoned, suppressed or concealed the same;

- (g) Because the differences between the subject matter sought to be patented by said patents and the prior art are such that the subject matter as a whole would have been obvious at the time the alleged inventions were made to a person having ordinary skill in the art to which the said subject matter pertains;
- (h) Because the specification in each of the aforesaid patents fails to contain a written description of the alleged invention and of the manner and process of making and using it, in such full, clear, concise and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and fails to set forth the best mode contemplated by the named inventor to carry out his alleged invention;
- (i) Because the claims of each of the aforesaid patents are vague and indefinite and fail to particularly point out or distinctly claim the subject matter which the said applicant regards as his invention; and
- (j) Because if any one of the said patents be construed to cover the said ladies' undergarments manufactured or sold by plaintiff, Vanity Fair, said patent or patents are invalid in view of the prior art.

WHEREFORE, plaintiff prays:

- (1) That this Court grant and enter a judgment or decree declaring said patents Nos. 3,142,300 and 3,142,301 are invalid and void, and that neither one of said patents is infringed by the said ladies' undergarments made, used and/or sold by plaintiff, or used or sold by plaintiff's customers.
- (2) That this Court enter a judgment or decree declaring that it is the right of plaintiff to make, use and sell said

ladies' undergarments, and of its customers to sell or use said undergarments without any threats or other interference whatsoever by or from defendant, or its successors in title to said patents and each of them, based on or arising out of the ownership of said patents or any interest therein.

- (3) That the defendant be enjoined pending the final adjudication of this action from bringing any actions against any sellers or users of plaintiff's said ladies' undergarments for alleged infringement of defendant's patent rights under either one or both of said patents.
- (4) That defendant, its officers, agents, servants, employees and attorneys be enjoined from charging or asserting that the manufacture, use or sale of the said ladies' undergarments manufactured and/or sold by plaintiff is in violation of or infringes upon defendant's patent rights under any one or both of said patents.
- (5) That the costs of this action be assessed against defendant.
- (6) That plaintiff have such other and further relief as may be just, including reasonable attorneys' fees.

Pennie, Edmonds, Morton, Taylor and Adams Attorneys for Plaintiff

By Willis H. Taylor, Jr. Willis H. Taylor, Jr. Member of Firm

Of Counsel:

WILLIS H. TAYLOR, JR.

Answer and Counterclaim.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

ANSWER

Defendant, for its answer to the Complaint herein:

- 1. Admits the allegations of paragraph 1.
- 2. Admits the allegations of paragraph 2.
- 3. Admits the allegations of paragraph 3.
- 4. Admits the allegations of paragraph 4 except that defendant avers that United States Letters Patent No. 3,142,300 was duly and legally issued on July 28, 1964—not January 28, 1964.
 - 5. Admits the allegations of paragraph 5.
 - 6. Admits the allegations of paragraph 6.
 - 7. Denies the allegations of paragraph 7.
 - 8. Admits the allegations of paragraph 8.
 - 9. Denies the allegations of paragraph 9.

Answer and Counterclaim.

COUNTERCLAIM

- 10. On July 28, 1964, United States patent Nos. 3,142,300 and 3,142,301 were duly and legally issued upon applications of Olga Erteszek for inventions in ladies' undergarments; and defendant is the owner of each of said patents with the right to sue and collect damages for past infringement thereof.
- 11. Plaintiff has been infringing and still is infringing each of said patents within this District and elsewhere by making, using and selling ladies' undergarments embodying the patented inventions, and will continue to do so unless enjoined by this Court. Upon information and belief plaintiff's said infringement is and has been willful and deliberate.
- 12. Defendant has placed the required statutory notice on all ladies' undergarments manufactured and sold by it under said patents, and has given written notice to plaintiff of its said infringement.

WHEREFORE, defendant prays:

- (a) That plaintiff's Complaint be dismissed;
- (b) For a judgment that United States patents Nos. 3,142,300 and 3,142,301 are valid and that plaintiff has infringed each of said patents;
- (c) That plaintiff and all those in privity with it be enjoined from further infringement of said patents or either of them:
- (d) That plaintiff be ordered to account for the damages to which defendant is entitled by reason of plaintiff's acts herein complained of;

Answer and Counterclaim.

- (e) That interest and costs be assessed against plaintiff, and that defendant be awarded its reasonable attorneys' fees in this action;
- (f) That defendant be granted such other and further relief as this court shall deem just.

Ward, Haselton, McElhannon, Brooks & Fitzpatrick

By: STUART A. WHITE Stuart A. White Attorneys for Defendant

OF COUNSEL:

Nicholas L. Coch

H. Calvin White

Louis J. Bachand, Jr.

Address: White and Haefliger 201 South Lake Avenue

Pasadena, California 91101

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

REPLY

Plaintiff, Vanity Fair Mills, Inc., replying to defendant's counterclaim alleges:

- 10. Plaintiff admits the issuance of United States Patents Nos. 3,142,300 and 3,142,301 on July 28, 1964, and that defendant is the owner of each of said patents, as alleged in paragraph 10 of the counterclaim, but plaintiff denies said patents were duly and legally issued and denies each and every other allegation of said paragraph 10.
- 11. Plaintiff denies the allegations of paragraph 11 of the counterclaim.
- 12. Plaintiff admits it was given written notice of infringement of said patents as alleged in paragraph 12 of the counterclaim, but plaintiff denies each and every other allegation of said paragraph 12.
- 13. Plaintiff further replying to defendant's counterclaim alleges each one of the defendants' aforesaid patents is invalid and void for the reasons stated below:
 - (a) Because prior to the alleged inventions by the named applicant for each of the said patents, or

more than one year prior to the dates of the applications for each of said patents, the alleged inventions were patented or described in printed publications in the United States or in foreign countries;

- (b) Because the named applicant for said patents was not the original or first inventor or discoverer of the alleged inventions purporting to be patented therein, but the same had previously been devised by others;
- (c) Because prior to the alleged inventions by the named applicant for said patents said alleged inventions had been known to or used by others in the United States;
- (d) Because for more than one year prior to the filing of the applications for said patents in the United States, the alleged inventions, or all material or substantial part or parts thereof, had been in public use or on sale in this country;
- (e) Because the alleged inventions of said patents were described in patents granted on applications for patents of others filed in the United States before the alleged invention thereof by the applicant for the aforesaid patents;
- (f) Because prior to the alleged invention by the named applicant for said patents, the alleged inventions were made in this country by others who had not abandoned, suppressed or concealed the same:
- (g) Because the differences between the subject matter sought to be patented by said patents and the

prior art are such that the subject matter as a whole would have been obvious at the time the alleged inventions were made to a person having ordinary skill in the art to which the said subject matter pertains;

- (h) Because the specification in each of the aforesaid patents fails to contain a written description of the alleged invention and of the manner and process of making and using it, in such full, clear, concise and exact terms as to enable any persons skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and fails to set forth the best mode contemplated by the named inventor to carry out his alleged invention;
- (i) Because the claims of each of the aforesaid patents are vague and indefinite and fail to particularly point out or distinctly claim the subject matter which the said applicant regards as his invention; and
- (j) Because if any one of the said patents be construed to cover the said ladies' undergarments manufactured or sold by plaintiff, Vanity Fair, said patent or patents are invalid in view of the prior art.

Wherefore, plaintiff prays:

- (1) That defendant's counterclaim be dismissed.
- (2) That this Court grant and enter a judgment that United States Patents Nos. 3,142,300 and 3,142,301 are invalid and void, and that plaintiff has not infringed said patents or either of them.

- (3) That the costs of this action be assessed against defendant.
- (4) That plaintiff have such other and further relief as may be just including reasonable attorneys' fees in this action.

Pennie, Edmonds, Morton, Taylor and Adams Attorneys for Plaintiff

By WILLIS H. TAYLOR, JR. Willis H. Taylor, Jr. Member of Firm

Of Counsel:

WILLIS H. TAYLOR, JR.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

GRIESA, J.

This is a patent infringement case involving two patents on women's panty briefs. The patents, Nos. 3,142,300 ("300") and 3,142,301 ("301"), were issued to Olga Erteszek, the inventor, on July 28, 1964. Mrs. Erteszek assigned the patents to the defendant, Olga Company (Inc.) ("Olga"), a company of which she was co-founder. Olga has since 1963 marketed a brief embodying the patents.

Plaintiff Vanity Fair Mills Inc. is, like Olga, a manufacturer of women's undergarments and lingerie. Between 1967 and 1969 Vanity Fair's line included a brief (Vanity Fair style number 40-28) which is accused in this action of infringing the Olga patents.

Vanity Fair seeks a judgment declaring that the Olga patents are invalid and that, in any event, Vanity Fair has not infringed the patents. Olga, in its answer to the complaint, denies that its patents are invalid and counterclaims for damages and for alleged infringement.

FACTS

Description of Garments

There are three basic types of garments in the girdle family. The first is the girdle proper, or "skirt girdle," which is made up of an elastic member encircling the abdomen and hips. The second is the "panty girdle,"

which includes a closed crotch and leg extensions. The third type is the "brief" or "panty brief," which is a panty girdle without legs—i.e., basically containing only the elastic encircling member and a crotch piece. All three types of garments have been made since the 1930's or early 1940's. The Erteszek patents in suit relate to the third type—the brief.

Of the three types of garments, the girdle generally provides the most figure control. However, it has at least one disadvantage—the need for garters to prevent it from "riding up" as the wearer changes position. This problem presents difficulties in connection with short skirts, pants and certain athletic costumes: Hence the resort to panty girdles and briefs.

Despite the advantages of the panty brief in affording maximum freedom, etc., this type of garment has presented two problems. The first is how to obtain enough flattening of the abdomen. The second is discomfort resulting from binding in the crotch and around the legs. The evidence indicates that there were various efforts over the years to solve these problems, none of which were entirely successful.

For instance, Mrs. Erteszek designed and marketed a brief in the late 1940's and 1950's which attempted, in a manner not entirely clear, to provide sufficient stomach control and avoid binding in the legs and crotch. The garment apparently did not achieve the desired results.

In 1954 Gossard introduced a type of brief designed to ease the teg and crotch binding (Peck Design Patent 174,054). The Gossard garment is illustrated in Figure 1.

Figure 1.

(See following page)

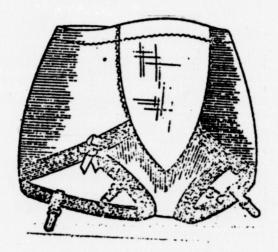


FIGURE 1

In the Gossard brief the leg was cut quite high, and around the leg opening there was sewn a rather wide strip of elastic of a much softer quality—having less "kick"—than the elastic material in the body of the garment. As stated in a Gossard advertisement:

"You need never again hear the old pantie complaint, it binds my legs.' Gossard's new pantie is so radically different that legs can't feel it. And this pantie really controls the figure. . . ." (emphasis in original)

The record does not show the extent to which this garment was or was not successful. Despite the fact that Gossard termed its garment "radically different" it was basically the same in design as the earlier briefs, except that its leg openings were made of a softer fabric.

In 1955 Maidenform put on the market a garment described as a "combination garter-belt and panty-brief" (Rosenthal Patent 2,763,008). But this garment (illustrated in Figure 2) required garters and was not a brief in the true sense of the word. It was not commercially successful.

Figure 2.

(See following page)

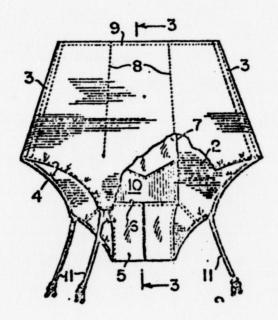


FIGURE 2

The New Erteszek Designs

In 1962 Mrs. Erteszek worked out a design of a brief which represented a substantial change in construction from prior models of this type of garment. The design is shown in Figure 3. This is the design involved in the 301 patent.

The Erteszek 301 brief is made up basically of two constituent members. The first member is a torso-encircling elastic body which serves the purposes of a girdle. The second member consists of a separate piece of fabric which is cut and sewn in such a way as to constitute a panel which overlays the girdle member in the front, and then extends down under the crotch and is attached to the girdle member at the back.

The panel-crotch member is stitched down the front to the points marked in Figure 3 with "X". The panel-crotch member is not stitched to the girdle member at any point below points "X" until it has passed under the crotch and meets the back of the girdle member at points "Z", where it is sewn to the girdle member. Consequently at the points "Y"—which mark the intersection of the bottom of the girdle member with the panel-crotch member—the two members are separate and independent.

Figure 3.

(See following page)

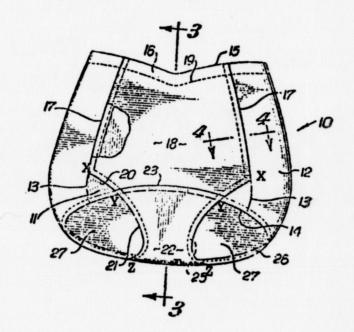


FIGURE 3

As Figure 3 shows, the leg openings are made up of the bottom edge of the girdle member (passing around the outsides of the legs) and the panel-crotch member (passing around the insides of the legs). The unique feature of the 301 design is that the leg openings are able to adjust naturally, as the position of the wearer changes. This results from the fact that in the area of points "Y" in Figure 3 the girdle member and the panel-crotch member can move independently of each other.

The purpose of this design is to alleviate the crotch and leg discomfort which were problems in prior designs of briefs. In addition, the panel in the Erteszek 301 design affords additional stomach control. There is apparently enough of an inward pull exerted by the panel-crotch member to give some appreciable assistance to the stomach flattening effect of

the girdle member.

Prior to marketing her new model of brief, Mrs. Erteszek found it necessary to make one modification in the 301 garment. In testing the 301 brief, Mrs. Erteszek discovered that, while the independence of the girdle and panel-crotch members at points "Y" enhanced the comfort of the garment, there was an off-setting disadvantage in that the border of the girdle member in this area tended to ride up.

In order to solve this problem, Mrs. Erteszek added a piece of loose tricot material inside the original crotch piece and connecting the bottom of the front of the girdle member with the crotch piece. The garment with this modification is involved in the 300 patent and is illustrated in Figure 4. The tricot piece is sewn to the girdle member at "XX" and to the crotch piece at "YY". The intent is to have the tricot piece be loose enough to permit the adjustment of the leg openings as in the 301 garment, while at the same time preventing the girdle member from riding up.

The Patent Applications

a. The 301 Patent

The application for the 301 patent was filed on November 20, 1962. On August 12, 1963 the Examiner rejected all six claims in the application as unpatentable over Rosenthal Patent No. 2,763,008 and one other prior patent.

The Rosenthal relates to the Maidenform garterbelt and pantie-brief described above. As indicated in Figure 2 the Rosenthal design involves a torso encircling member with a "panel" running inside that member, running down under the crotch. The Examiner, in rejecting the Olga application, stated that the differences between the Olga and Rosenthal designs (principally involved in Olga's having the panel run outside the girdle member) were merely changes "within the normal skills of the art."

Figure 4.

(See following page)

Fixe. 2. 14 3 15 10 12 12 17 XX 16 17 XX 16 23 YY 22 23 YY 23 24 25 26

FIGURE 4

Following the August 12, 1963 rejection by an Examiner, Claim 1 was amended. On November 7, 1963 the Examiner rejected all claims in the application on the ground that they were indefinite and incomplete, indicating that the application did not define with sufficient precision the functions of the components of the garment.

A further amendment was made to Claim 1. On December 10, 1963 the Examiner rejected all six claims, again comparing the Erteszek design with the Rosenthal patent, and stating:

"The inclusion of 'a front panel . . . overlying the front of the body' involves merely a simple expedient of choice. This would be an obvious reversal of arrangements. No new nor unobvious result or advantage is seen in disposing the front panel upon the front body portion. The recitation of a curved edge portion and elastic fabric in the crotch portion represent no more than the skillful arrangement of elements well known in this crowded art. These features are those which would flow naturally from the teachings of the prior art within the capabilities of one of ordinary skill in the art of body supports."

On January 20, 1964 counsel for Mrs. Erteszek interviewed the Examiner and displayed sample garments based on the Rosenthal and Erteszek designs, and thereafter submitted a new Claim 7 to substitute for Claim 1 and a further written explanation of the functional differences between the two designs, stating in part:

"As the Examiner has indicated in the Official Action of December 10, 1963, one of the principal differences between the applicant's garment and that disclosed in Rosenthal lies in the fact that the applicant's 'panel' overlies or is on the outside of the torso encircling

body. However, this is not, as suggested, merely a matter of choice since the applicant's structure permits achieving a result which is not possible in, or even comprehended by, Rosenthal's patent. In the applicant's structure, when tension is applied to the crotch portion, the 'panel' is tensioned, and this can impose a flattening force on the underlying abdominal portions of the wearer. Such force is superimposed on that of the torso encircling bedy to produce an important cooperative effect. On the other hand, in Rosenthal, when tension is applied downwardly by the crotch portion, the insert would be pulled inwardly away from the torso encircling body."

Thereafter the Examiner found the application allowable (with the new Claim 7 becoming Claim 1), and Letters Patent for Patent No. 3,142,301 were issued July 28, 1964.

b. The 300 Patent

The application for the 300 patent was filed April 29, 1963. As noted earlier, the 301 application had been filed on November 20, 1962.

Basically the claims in the 300 application were the same as the claims in the 301 application except for the addition of the inside crotch piece.

Mrs. Erteszek submitted a preliminary amendment on October 4, 1963. On February 28, 1964 the Examiner rejected all the claims in the 300 application on the ground that they were indefinite and incomplete, and on the ground that the crotch piece element did not constitute a patentable change over certain prior patents, including the Rosenthal patent referred to earlier.

Mrs. Erteszek submitted an amendment on April 10, 1964. Counsel for Mrs. Erteszek interviewed the Examiner

on May 12, 1964. Another amendment was submitted on May 21, 1964.

Thereafter the Examiner found the amended application allowable, and Letters Patent for Patent No. 3,142,300 were issued July 28, 1964—the same date the 301 patent was issued.

Marketing of the Olga Garment

A garment based on the 300 design was marketed by Olga beginning in 1963. The garment met with immediate commercial success.

By the time of the trial of this action the Olga brief had been on the market for ten years. The number of units sold and the dollar volume of sales were as follows:

Year	Units	\$ of Sales
1963	70,502	264,383.00
1964	74,638	279,893.00
1965	60,810	228,030.00
1966	73,626	280,535.00
1967	73,314	293,256.00
1968	82,195	329,243.00
1969	59,424	237,694.00
1970	46,457	185,825.00
1971	62,198	254,925.00
1972	69,323	270,358.00

A former executive vice president of Vanity Fair has testified that a ten-year commercial life span for a garment is indicative that the garment performs a fundamental or basic function—rather than being merely a matter of transitory fashion.

The Vanity Fair Garment

Vanity Fair has marketed various models of briefs over the years. Prior to the introduction of the alleged infringing garment, the Vanity Fair briefs were apparently conventional garments with standard leg openings. The evidence is sufficient to indicate that these Vanity Fair briefs were less than successful in respect to stomach control and leg comfort.

For instance, in 1964 Vanity Fair introduced its model 40-6. This model was marketed from 1964 to 1967 and then withdrawn. This garment was advertised as follows:

"Curved-away shaping at front of leg gives complete freedom and comfort, back darting insures perfect ease and fit under all clothes including active sportswear. Important: double-strength Lycra panel in front gives extraordinary control in so minimal a brief."

Grove H. Lands, merchandise manager of Vanity Fair, testified at the trial regarding the development and marketing of various Vanity Fair garments. Although he was naturally reluctant to admit any lack of success in a Vanity Fair product, the evidence is quite convincing that the model 40-6 and other similar Vanity Fair briefs had problems. For instance, Mr. Lands testified in his deposition that the 40-6 did not really succeed. It did not have sufficient abdomen control. He also indicated in his deposition that "one of the biggest negatives" in Vanity Fair briefs was leg binding.

Vanity Fair set out to develop an improved type of brief. The result was the alleged infringing garment, Vanity Fair model 40-28. This model was introduced in the market in the fall of 1967. At this same time, model 40-6 was dropped. Another Vanity Fair brief, model 40-50, was dropped at the same time.

Vanity Fair model 40-28 was essentially the same garment as the Olga 300 brief, having exactly the same arrangements for the overlying front panel and the flexible leg openings. There were a few differences between the two garments in other respects. For instance, in the Vanity Fair garment the two ends of the girdle member overlapped at the front of the garment; whereas in the Olga garment, the two ends of the girdle member did not overlap. But the unique, patented features of the Olga garment appeared virtually without change in the Vanity Fair model.

Vanity Fair's designer for model 40-28 admits that she was familiar with the Olga garment and had it in her design studio. Vanity Fair's former executive vice president testified that he discussed with Vanity Fair's vice president for sales the matter of developing an improved brief. The latter regarded the Olga brief as one of the better selling briefs in the industry, having certain desirable functional characteristics—greater control at the waist and an improved leg opening.

Vanity Fair marketed its model 40-28 from the fall of 1967 until sometime in 1969, when it was discontinued. During this time model 40-28 was Vanity Fair's largest selling brief. The total quantity sold was 12,455 dozen. It is not clear why the model was discontinued.

CONCLUSIONS OF LAW

Validity of Olga Patents

Vanity Fair concedes that it has the burden of proving the invalidity of the challenged Olga patents.

The familiar requirements for patentability are that the article must be (1) useful, (2) novel, and (3) non-obvious. 35 U.S.C. §§ 101-103. Vanity Fair bases its assertion of invalidity upon the claim that the subject matter sought

to be patented was "obvious" within the meaning of 35 U.S.C. § 103, which provides in pertinent part:

"A patent may not be obtained . . . if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains."

The Supreme Court has described the nature of the inquiry into the question of obviousness as follows:

"Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or non-obviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy." Graham v. John Deere Co., 383 U.S.1, 17-18 (1966).

At the trial Vanity Fair introduced evidence regarding prior art, consisting of some 13 examples of girdles, panty girdles and briefs. Patents had been issued as to 11 of these. The only one of these garments which Vanity Fair seriously contends to have anticipated the Olga patents in question is the garment based upon Rosenthal Patent 2,763,008 previously described, which was marketed in 1955 by Maiden Form.

I find that neither the Rosenthal patent, nor any of the other examples of prior art referred to by Vanity Fair,

anticipated, or made obvious, the Olga patents.

A number of the examples referred to by Vanity Fair are girdles or panty girdles, which, as already described, are fundamentally different from the type of garment involved in the Olga patents—the brief. These girdles and panty girdles did not include or anticipate the unique panel and leg-opening arrangements which characterized the Olga patents.

With regard to briefs, Vanity Fair has referred to a number of examples which preceded the Olga patents, including the Gossard garment referred to earlier. However, none of these briefs included or anticipated the panel and

leg-opening arrangements of the Olga patents.

In connection with the Rosenthal patent, Vanity Fair relies strongly on the fact that the Patent Examiner twice rejected the Olga 301 patent claims on the basis that they had been anticipated by the Rosenthal patent. Vanity Fair asserts (and the Patent Examiner at first held) that the Olga patents were merely obvious rearrangements of elements contained in the Rosenthal patent. Vanity Fair contends that the Rosenthal and Olga designs are basically the same, except for the fact that in Rosenthal there is a panel running downward inside the girdle member, whereas in the Olga patents the downward panel runs outside the girdle member. Vanity Fair relies on cases such as Warner Bros. Co. v. American Lady Corset Co., 48 F. Supp. 417 (S.D.N.Y. 1942), aff'd 136 F.2d 93 (2d Cir. 1943), which hold that an obvious rearrangement of familiar elements does not constitute invention.

But the American Lady case involved merely the shifting or rearrangement of panels of stretch material in the design of a corset. It is not controlling here. What is involved in the present case is a novel type of garment

construction, which was far from obvious, as demonstrated by the history of unsuccessful efforts by other designers to solve certain basic structural problems.

I cannot agree that the Olga garment involved an obvious rearrangement of the elements of Rosenthal. The differences between the two garments are far more fundamental than simply a change in position of a panel. It is true that the Rosenthal garment contains a kind of panel running downward inside of the girdle member, whereas the Olga garment has a panel running downward outside the girdle member. But the overall result reached in the Olga garment is utterly different from the result in the Rosenthal garment. The relationship between the downward panel and the girdle member in Rosenthal does not in any way create the type of flexible leg openings involved in the Olga patents, nor are such flexible leg openings even suggested by the Rosenthal design. The degree and type of stomach control are radically different in the two garments. Some indication of the distinction is given by the title of the Rosenthal garment stated in the patent application— "girdle panty garter belt." I cannot conclude that Rosenthal suggested or anticipated the Olga design.

The Patent Examiner's initial rejections of the Olga 301 patent on the basis of Rosenthal are of very little persuasive value. They were made on the basis of drawings and written descriptions, which were not fully illuminating. After the Patent Examiner had the benefit of actual sample garments and full explanation, the 301 patent was allowed.

In any event, our Court of Appeals has recently emphasized the appropriateness of viewing prior art in the context of the problems in the particular industry or trade. In Shaw v. E. B. & A. C. Whiting Co., 417 F.2d 1097, 1104-5 (2d Cir. 1969), cert. denied, 397 U.S. 1076 (1970), the Court stated, in dealing with the patent there

involved:

"Here . . . individually old concepts were combined to solve an existing problem in the art, and

Where the invention for which a patent is sought solves a problem which persisted in the art, we must look to the problem as well as to its solution if we are to properly appraise what was done and to evaluate it against what would be obvious to one having the ordinary skills of the art. In re Rothermel, 276 F.2d 393, 397 47 C.C.P.A. 866 (1960).

"The district court failed to evaluate the problem posed by the prior art and appears to have relied on the proposition that, as Shaw's solution to the problem seemed a simple one, his filament was an obvious outgrowth. The simplicity of an invention or an improvement thereof is not, however, the test of its obviousness. Goodyear Tire and Rubber Co. v. Ray-O-Vac Co. 321 U.S. 275, 279, 64 S.Ct. 593, 88 L.Ed. 721 (1944). Further, the burden is on the appellee to show facts that would lead to the conclusion that appellant's product was obvious. The mere recital of the known elements in the art does not, without more, invalidate the patent under Section 103. There must appear evidence that the bringing together of these elements would have been obvious. Doubt as to validity, no matter how strong, cannot justify resort to unfounded assumptions or supply deficiencies in the factual background. Graham v. John Deere Co., supra."

The Supreme Court in *Graham* v. *John Deere Co.*, 383 U.S. 1, 17-18 (1966) has described certain of the factual considerations to be taken into account—commercial success, long-felt but unsolved needs, failure of others.

When the factual background is considered, Vanity Fair's claim of obviousness with respect to the Olga patents must be rejected. The evidence demonstrates that the foundation garment industry had worked for many years to solve two problems in the design of panty briefs. It proved to be difficult to build into a light garment such as a panty brief any adequate stomach control. Also, there was the aggravation of the leg and crotch discomfort. These were basic problems, and they pertained to a type of foundation garment which was becoming more and more important as women's outerwear styles changed to shorter skirts, increased use of pants, etc.

The Olga design—relating to an outer panel, inside crotch piece, and girdle member in such a way as to achieve greater stomach control while affording greater leg and crotch comfort—involved a unique and novel garment structure. In 20 years or more of designing and marketing panty briefs, the foundation garment industry had not produced a design with these benefits. Whether the Olga design is the ultimate solution to the problems described above is something which I cannot, and need not, determine. What the record does show clearly is that Olga arrived at a highly original construction, which offered a solution of the stomach and leg and crotch problems in a way no other design appears to have attempted. The Olga garment has had an unusually long and successful commercial life.

The circumstances of the development of the accused Vanity Fair garment in themselves tend to negate the claim that the Olga designs were obvious. Prior to the design of the accused garment, Vanity Fair's garments partook of the typical stomach and leg problems. Vanity Fair sales executives requested the company's designers to come up with a garment which offered a better solution to these problems. What the Vanity Fair designers ar-

rived at was none other than a garment precisely embodying the features of the Olga garment. The accused Vanity Fair garment was that company's most successful brief during the time it was marketed.

Under all the circumstances, I hold that Vanity Fair has not met its burden of proving that the matters presented in the Olga 301 and 300 patents were obvious.

One further argument of Vanity Fair must be dealt with. Vanity Fair contends that the Olga 300 patent is invalid because the Olga 301 patent constituted anticipatory prior art.

This argument must be rejected. It is true that a problem can arise when the same inventor attempts to obtain successive patents for basically the same invention. This is the problem of "double patenting", and the vice is that such double patenting may lead to a prolongation of the inventor's monopoly. Application of Braithwaite, 379 F.2d 594, 601 (C.C.P.A. 1967). But it has been held that where the inventor makes a "terminal disclaimer"—i.e., where the inventor agrees to having the second patent terminate upon the expiration date of the first patent—then both patents may be allowed. Application of White, 405 F.2d 904, 906 (C.C.P.A. 1969); Application of Braithwaite, supra.

The rule allowing two patents by the same inventor where there is a terminal disclaimer applies by analogy in the present case. Here, because the two patents were granted on the same day, both patents will automatically terminate at the same time. Thus there is no possibility that the second patent will create an improper extension of time for the monopoly. Under these circumstances, both the Olga 301 and 300 patents should be upheld.

This result accords with common sense. From a realistic standpoint, the 301 design cannot be held to be "prior art" with respect to the 300 design. Both the 301

and the 300 designs were in fact part of the same inventive process. The 300 design incorporated the elements of the 301 design and made a substantial improvement. For the purposes of patent validity, both designs and both patents should be treated together, as the Patent Office ultimately did in granting the two patents on the same day.

For the above reasons, I hold that Vanity Fair has not proved the invalidity of the Olga 301 and 300 patents.

Infringement

Vanity Fair's only defense to Olga's counterclaim for infringement is the contention that the Olga patents are invalid. My rejection of Vanity Fair's claim of invalidity necessarily resolves the infringement question. In any event, it is clear that the accused Vanity Fair garment contains the essential patented features of the Olga 301 and 300 patents. Vanity Fair is thus liable for infringement.

Damages

Assessment of damages for infringement is governed by 35 U.S.C. § 284, which provides:

"Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

"When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed.

"The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances."

In Aro Manufacturing Co., Inc. v. Convertible Top Replacement Co., Inc., 377 U.S. 476, 507 (1964), the Supreme Court stated:

"But the present statutory rule is that only 'damages' may be recovered. These have been defined by this Court as 'compensation for the pecuniary loss he [the patentee] has suffered from the infringement, without regard to the question whether the defendant has gained or lost by his unlawful acts.' Coupe v. Royer, 155 U.S. 565, 582. They have been said to constitute 'the difference between his pecuniary condition after the infringement, and what his condition would have been if the infringement had not occurred.' Yale Lock Mfg. Co. v. Sargent, 117 U.S. 536, 552. question to be asked in determining damages is 'how much had the Patent Holder and Licensee suffered by the infringement. And that question [is] primarily: had the infringer not infringed, what would Patent Holder-Licensee have made?' Livesay Window Co. v. Livesay Industries, Inc., supra, 251 F.2d, at 471.

The patented Olga brief has been marketed continuously since 1963. The infringing Vanity Fair garment was placed on the market in the fall of 1964 and was marketed until some time in 1967. The evidence sufficiently shows that the infringing brief was in competition with the Olga brief. During the time the infringing brief was marketed the sales of the Olga brief dropped from 74,638 units in 1964 to 60,810 units in 1965, although sales rebounded to 73,626 units in 1966 and 73,314 units in 1967. In 1968—

after the Vanity Fair brief was withdrawn—sales of the Olga brief went to 82,195 units.

During the period of about three years when the Vanity Fair brief was on the market, 12,455 dozen briefs—or 149,460 briefs—were sold. This amounts to nearly 50,000

briefs per year.

I find it difficult to conclude that Olga would have sold anything approaching 50,000 additional briefs per year during the time in question, had it not been for Vanity Fair's competition. On the other hand, I believe that the evidence does justify a finding that Olga's drop in sales from 74,638 units in 1964 to 60,810 in 1965 resulted from the introduction of the Vanity Fair garment. An inference as to Olga's potential sales during 1965-1967, the years of competition from the Vanity Fair brief, may be fairly drawn from Olga's 1968 sales figure of 82,195 units. believe it is fair to find that Olga's potential sales of its brief in the years 1965-1967 were 80,000 units per year. On this basis, I would find that Olga lost sales in 1965 of 19,000 units and in each of the years 1966 and 1967 Olga lost sales of 6,000 units. The total lost sales were 31,000 units.

The record indicates that Olga was selling its briefs for \$48.00 per dozen and made a profit of \$12.00 per dozen. On the basis of the above figures, I would find a lost profit of about \$31,000.

The statute provides that damages shall be no less than a reasonable royalty. The evidence shows that Vanity Fair was selling its briefs at \$45.00 per dozen. The 12,455 dozen briefs sold by Vanity Fair were thus sold for \$560,475. The evidence presented by Olga would justify a royalty rate of 5%. Such a royalty on sales of \$560,475 would be \$28,024.

Under all the circumstances, it would appear that a damage award of \$31,000 is justified. In addition, interest is awarded from January 1, 1966—the median point for the infringement.

Olga has requested application of the statutory provision for award of treble damages. In my view, the circumstances of this case do not justify trebling.

CONCLUSION

Vanity Fair's complaint charging the invalidity of Olga patents 3,142,301 and 3,142,300 should be dismissed. Olga is entitled, on its counterclaim, to a declaration of the validity of the patents and an injunction against Vanity Fair prohibiting further infringement. Olga is further entitled to damages in accordance with this opinion.

The parties should settle the necessary order and judgment.

Dated: New York, New York, January 8, 1974.

Thomas P. Griesa U.S.D.J.

Judgment.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

This action came on for trial before the Court, Honorable Thomas P. Griesa, District Judge, presiding, and the issue as to validity and infringement of the patents in suit and damages with respect thereto having been duly tried and an opinion having been duly rendered on January 8, 1974, which opinion shall constitute the Court's Findings of Fact and Conclusions of Law,

IT IS ORDERED AND ADJUDGED:

- 1. This Court has jurisdiction of the parties and the subject matter of this action.
- 2. Defendant, Olga Company, is the owner of United States Letters Patent Nos. 3,142,300 and 3,142,301.
- 3. That claims 1 and 3, inclusive, of United States Letters Patent No. 3,142,300 and claims 1 and 2, inclusive, of United States Letters Patent No. 3,142,301 were and are good and valid in law.
- 4. That the plaintiff, Vanity Fair Mills, Inc., has infringed claims 1 and 3, inclusive, of United States Letters

Judgment.

Patent No. 3,142,300 and claims 1 and 2, inclusive, of United States Letters Patent No. 3,142,301 by making, using and selling panty briefs as recited in said claims, namely, those sold by defendant as Vanity-Fair style number 40-28.

- 5. That the defendant, Olga Company, recover of the plaintiff, Vanity Fair Mills, Inc., the sum of \$31,000 as damages pursuant to 35 U.S.C. § 284 for said infringements, with interest thereon at the rate of 6 per cent per annum from January 1, 1966, as provided by law, and its costs of this action.
- 6. That the plaintiff, Vanity Fair Mills, Inc., its President, and its other officers, servants, agents, employees, directors and affiliates, and all persons, firms and corporations claiming by, through or under it, or in privity with it, and all those persons in active concert or participation with it who receive actual notice of this Judgment by personal service or otherwise, be and each and every one of them are hereby permanently enjoined and restrained for the remainder of the term of said Letters Patents from infringing, practicing or using or from actively causing or inducing others to infringe, practice or use the panty briefs covered by claims 1 and 3, inclusive, of United States Letters Patent No. 3,142,300 and claims 1 and 2, inclusive, of United States Letters Patent No. 3,142,301.
- 7. The Complaint herein for a declaratory judgment that said United States Letters Patent Nos. 3,142,300 and 3,142,301 are invalid, unenforceable and not infringed be and hereby are dismissed.

Judgment.

8. Defendant's Counterclaim herein be and hereby is sustained.

Dated: New York, New York, January 23, 1974

United States District Judge

Approved as to form: with deletion in $\P 2$, p. 1, hereof and revision of $\P 4$ line 3, p. 2

WILLIS H. TAYLOR, JR. Attorney for Plaintiff Vanity Fair Mills, Inc.

Dated: New York, New York, January , 1974

NICHOLAS L. COCH Attorney for Defendant Olga Company (Inc.)

Order of February 21, 1974 Amending Opinion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

GRIESA, J.

Olga Company (Inc.) has moved under F.R.C.P. 60(a) to correct an error in the Court's opinion in this case dated January 8, 1974.

In the opinion, at pages 24-25, there was a calculation of damages based upon lost profits for the years 1964-1967.

The calculation of lost profits was \$31,000.

Olga's motion calls the attention of the Court to the fact that the infringing garment was marketed during the years 1967-1969 rather than during the years 1964-1967. Thus the calculation of damages based on lost profits was in error.

However, the opinion presented an alternative calculation of damages (p. 26) in the nature of a reasonable royalty.

This royalty, as calculated, amounted to \$28,024.

Under the terms of the applicable statute, 35 U.S.C. § 284, which provides that damages shall be no less than a reasonable royalty, the Court awarded the \$31,000 lost profits.

Olga, in its present motion, concedes that its lost profits for the actual period of infringement were no greater than

the reasonable royalty as calculated by the Court.

The result of the foregoing is as follows: The opinion of January 8, 1974 is hereby amended to omit the portion commencing on page 23 with the words "In Aro Manufacturing Co." to the end of page 25. The omitted portion concludes with the words "a lost profit of about \$31,000".

Order of February 21, 1974 Amending Opinion.

The second paragraph of page 26 is omitted and is replaced with the following paragraph:

Olga concedes that any lost profits did not exceed this royalty figure. Thus the amount of damages awarded to Olga is \$28,024. In addition, interest is awarded from January 1, 1968—the median point for the infringement.

Olga also moves for an appropriate amendment to the judgment of January 23, 1974. Paragraph 5 of said judgment is hereby amended to repeace the figure \$31,000 with the figure \$28,024 and to replace the date January 1, 1966 with the date January 1, 1968.

So ordered.

Dated: New York, New York, February 21, 1974.

THOMAS P. GRIESA THOMAS P. GRIESA U.S.D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

GRIESA, J.

This is a patent infringement case involving two patents on women's panty briefs. The patents, Nos. 3,142,300 ("300") and 3,142,301 ("301"), were issued to Olga Erteszek, the inventor, on July 28, 1964. Mrs. Erteszek assigned the patents to the defendant, Olga Company (Inc.) ("Olga"), a company of which she was co-founder. Olga has since 1963 marketed a brief embodying the patents.

Plaintiff Vanity Fair Mills Inc. is, like Olga, a manufacturer of women's undergarments and lingerie. Between 1967 and 1969 Vanity Fair's line included a brief (Vanity Fair style number 40-28) which is accused in this action of infringing the Olga patents.

Vanity Fair seeks a judgment declaring that the Olga patents are invalid and that, in any event, Vanity Fair has not infringed the patents. Olga, in its answer to the complaint, denies that its patents are invalid and counterclaims for damages and for alleged infringement.

Facts

Description of Garments

There are three basic types of garments in the girdle family. The first is the girdle proper, or "skirt girdle," which is made up of an elastic member encircling the abdomen and hips. The second is the "panty girdle," which includes a closed crotch and leg extensions. The third type

is the "brief" or "panty brief," which is a panty girdle without legs—i.e., basically containing only the elastic encircling member and a crotch piece. All three types of garments have been made since the 1930's or early 1940's. The Erteszek patents in suit relate to the third type—the brief.

Of the three types of garments, the girdle generally provides the most figure control. However, it has at least one disadvantage—the need for garters to prevent it from "riding up" as the wearer changes position. This problem presents difficulties in connection with short skirts, pants and certain athletic costumes. Hence the resort to panty girdles and briefs.

Despite the advantages of the panty brief in affording maximum freedom, etc., this type of garment has presented two problems. The first is how to obtain enough flattening of the abdomen. The second is discomfort resulting from binding in the crotch and around the legs. The evidence indicates that there were various efforts over the years to solve these problems, none of which were entirely successful.

For instance, Mrs. Erteszek designed and marketed a brief in the late 1940's and 1950's which attempted, in a manner not entirely clear, to provide sufficient stomach control and avoid binding in the legs and crotch. The garment apparently did not achieve the desired results.

In 1954 Gossard introduced a type of brief designed to ease the leg and crotch binding (Peck Design Patent 174,054). The Gossard garment is illustrated in Figure 1.

(Figure 1 same as figure 1 of Opinion.)

In the Gossard brief the leg was cut quite high, and around the leg opening there was sewn a rather wide strip of elastic of a much softer quality—having less "kick"—

than the elastic material in the body of the garment. As stated in a Gossard advertisement:

"You need never again hear the old pantie complaint, it binds my legs.' Gossard's new pantie is so radically different that legs can't feel it. And this pantie really controls the figure. . . ." (emphasis in original)

The record does not show the extent to which this garment was or was not successful. Despite the fact that Gossard termed its garment "radically different" it was basically the same in design as the earlier briefs, except that its leg openings were made of a softer fabric.

In 1955 Maidenform put on the market a garment described as a "combination garter-belt and panty-brief" (Rosenthal Patent 2,763,008). But this garment (illustrated in Figure 2) required garters and was not a brief in the true sense of the word. It was not commercially successful.

(Figure 2, Same as Figure 2 of Opinion.)

The New Erteszek Designs

In 1962 Mrs. Erteszek worked out a design of a brief which represented a substantial change in construction from prior models of this type of garment. The design is shown in Figure 3. This is the design involved in the 301 patent.

The Erteszek 301 brief is made up basically of two constituent members. The first member is a torso-encircling elastic body which serves the purposes of a girdle. The second member consists of a separate piece of fabric which is cut and sewn in such a way as to constitute a panel which overlays the girdle member in the front, and then extends down under the crotch and is attached to the girdle member at the back.

The panel-crotch member is stitched down the front to the points marked in Figure 3 with "X". The panel-crotch member is not stitched to the girdle member at any point below points "X" until it has passed under the crotch and meets the back of the girdle member at points "Z", where it is sewn to the girdle member. Consequently at the points "Y"—which mark the intersection of the bottom of the girdle member with the panel-crotch member—the two members are separate and independent.

(Figure 3, same as Figure 3 of Opinion.)

As Figure 3 shows, the leg openings are made up of the bottom edge of the girdle member (passing around the outsides of the legs) and the panel-crotch member (passing around the insides of the legs). The unique feature of the 301 design is that the leg openings are able to adjust naturally as the position of the wearer changes. This results from the fact that in the area of points "Y" in Figure 3 the girdle member and the panel-crotch member can move independently of each other.

The purpose of this design is to alleviate the crotch and leg discomfort which were problems in prior designs of briefs. In addition, the panel in the Erteszek 301 design affords additional stomach control. There is apparently enough of an inward pull exerted by the panel-crotch member to give some appreciable assistance to the stomach flattening effect of the girdle member.

Prior to marketing her new model of brief, Mrs. Erteszek found it necessary to make one modification in the 301 garment. In testing the 301 brief, Mrs. Erteszek discovered that, while the independence of the girdle and panel-crotch members at points "Y" enhanced the comfort of the garment, there was an offsetting disadvantage in that the border of the girdle member in this area tended to ride up.

In order to solve this problem, Mrs. Erteszek added a piece of loose tricot material inside the original crotch piece and connecting the bottom of the front of the girdle member with the crotch piece. The garment with this modification is involved in the 300 patent and is illustrated in Figure 4. The tricot piece is sewn to the girdle member at "XX" and to the crotch piece at "YY". The intent is to have the tricot piece be loose enough to permit the adjustment of the leg openings as in the 301 garment, while at the same time preventing the girdle member from riding up.

The Patent Applications

a. The 301 Patent

The application for the 301 patent was filed on November 20, 1962. On August 12, 1963 the Examiner rejected all six claims in the application as unpatentable over Rosenthal Patent No. 2,763,008 and one other prior patent.

The Rosenthal relates to the Maidenform garter-belt and pantie-brief described above. As indicated in Figure 2 the Rosenthal design involves a torso encircling member with a "panel" running *inside* that member, running down under the crotch. The Examiner, in rejecting the Olga

(Figure 4 same as Figure 4 of Opinion.)

application, stated that the differences between the Olga and Rosenthal designs (principally involved in Olga's having the panel run *outside* the girdle member) were merely changes "within the normal skills of the art."

Following the August 12, 1963 rejection by an Examiner, Claim 1 was amended. On November 7, 1963 the Examiner rejected all claims in the application on the ground that they were indefinite and incomplete, indicating that the

application did not define with sufficient precision the functions of the components of the garment.

A further amendment was made to Claim 1. On December 10, 1963 the Examiner rejected all six claims, again comparing the Erteszek design with the Rosenthal patent, and stating:

"The inclusion of 'a front panel . . . overlying the front of the body' involves merely a simple expedient of choice. This would be an obvious reversal of arrangements. No new nor unobvious result or advantage is seen in disposing the front panel upon the front body portion. The recitation of a curved edge portion and elastic fabric in the crotch portion represent no more than the skillful arrangement of elements well known in this crowded art. These features are those which would flow naturally from the teachings of the prior art within the capabilities of one of ordinary skill in the art of body supports."

On January 20, 1964 counsel for Mrs. Erteszek interviewed the Examiner and displayed sample garments based on the Rosenthal and Erteszek designs, and thereafter submitted a new Claim 7 to substitute for Claim 1 and a further written explanation of the functional, differences between the two designs, stating in part:

"As the Examiner has indicated in the Official Action of December 10, 1963, one of the principal differences between the applicant's garment and that disclosed in Rosenthal lies in the fact that the applicant's 'panel' overlies or is on the outside of the torso encircling body. However, this is not, as suggested, merely a matter of choice since the applicant's structure permits achieving a result which is not possible in, or even comprehended by, Rosenthal's patent.

In the applicant's structure, when tension is appplied to the crotch portion, the 'panel' is tensioned, and this can impose a flattening force on the underlying abdominal portions of the wearer. Such force is superimposed on that of the torso encircling body to produce an important cooperative effect. On the other hand, in Rosenthal, when tension is applied downwardly by the crotch portion, the insert would be pulled inwardly away from the torso encircling body."

Thereafter the Examiner found the application allowable (with the new Claim 7 becoming Claim 1), and Letters Patent for Patent No. 3,142,301 were issued July 28, 1964.

b. The 300 Patent

The application for the 300 patent was filed April 29, 1963. As noted earlier, the 301 application had been filed on November 20, 1962.

Basically the claims in the 300 application were the same as the claims in the 301 application except for the addition of the inside crotch piece.

Mrs. Erteszek submitted a preliminary amendment on October 4, 1963. On February 28, 1964 the Examiner rejected all the claims in the 300 application on the ground that they were indefinite and incomplete, and on the ground that the crotch piece element did not constitute a patentable change over certain prior patents, including the Rosenthal patent referred to earlier.

Mrs. Erteszek submitted an amendment on April 10, 1964. Counsel for Mrs. Erteszek interviewed the Examiner on May 12, 1964. Another amendment was submitted on May 21, 1964.

Thereafter the Examiner found the amended application allowable, and Letters Patent for Patent No. 3,142,300 were issued July 28, 1964—the same date the 301 patent was issued.

Marketing of the Olga Garment

A garment based on the 300 design was marketed by Olga beginning in 1963. The garment met with immediate commercial success.

By the time of the trial of this action the Olga brief had been on the market for ten years. The number of units sold and the dollar volume of sales were as follows:

Year	Units	\$ of $Sales$
1963	70,502	264,383.00
1964	74,638	279,893.00
1965	60,810	228,030.00
1966	73,626	280,535.00
1967	73,314	293,256.00
1968	82,195	329,243.00
1969	59,424	237,694.00
1970	46,457	185,825.00
1971	62,198	254,925.00
1972	69,323	270,358.00

A former executive vice president of Vanity Fair has testified that a ten-year commercial life span for a garment is indicative that the garment performs a fundamental or basic function—rather than being merely a matter of transitory fashion.

The Vanity Fair Garment

Vanity Fair has marketed various models of briefs over the years. Prior to the introduction of the alleged infringing garment, the Vanity Fair briefs were apparently con-

ventional garments with standard leg openings. The evidence is sufficient to indicate that these Vanity Fair briefs were less than successful in respect to stomach control and leg comfort.

For instance, in 1964 Vanity Fair introduced its model 40-6. This model was marketed from 1964 to 1967 and then withdrawn. This garment was advertised as follows:

"Curved-away shaping at front of leg gives complete freedom and comfort, back darting insures perfect ease and fit under all clothes including active sportswear. Important: double-strength Lycra panel in front gives extraordinary control in so minimal a brief."

Grove H. Lands, merchandise manager of Vanity Fair, testified at the trial regarding the development and marketing of various Vanity Fair garments. Although he was naturally reluctant to admit any lack of success in a Vanity Fair product, the evidence is quite convincing that the model 40-6 and other similar Vanity Fair briefs had problems. For instance, Mr. Lands testified in his deposition that the 40-6 did not really succeed. It did not have sufficient abdomen control. He also indicated in his deposition that "one of the biggest negatives" in Vanity Fair briefs was leg binding.

Vanity Fair set out to develop an improved type of brief. The result was the alleged infringing garment, Vanity Fair model 40-28. This model was introduced in the market in the fall of 1967. At this same time, model 40-6 was dropped. Another Vanity Fair brief, model 40-50, was dropped at the same time.

Vanity Fair model 40-28 was essentially the same garment as the Olga 300 brief, having exactly the same arrangements for the overlying front panel and the flexible leg openings. There were a few differences between the two garments in other respects. For instance, in the Vanity

Fair garment the two ends of the girdle member overlapped at the front of the garment; whereas in the Olga garment, the two ends of the girdle member did not overlap. But the unique, patented features of the Olga garment appeared virtually without change in the Vanity Fair model.

Vanity Fair's designer for model 40-28 admits that she was familiar with the Olga garment and had it in her design studio. Vanity's Fair's former executive vice president testified that he discussed with Vanity Fair's vice president for sales the matter of developing an improved brief. The latter regarded the Olga brief as one of the better selling briefs in the industry, having certain desirable functional characteristics—greater control at the waist and an improved leg opening.

Vanity Fair marketed its model 40-28 from the fall of 1967 until sometime in 1969, when it was discontinued. During this time model 40-28 was Vanity Fair's largest selling brief. The total quantity sold was 12,455 dozen. It is not clear why the model was discontinued.

Conclusions of Law

Validity of Olga Patents

Vanity Fair concedes that it has the burden of proving the invalidity of the challenged Olga patents.

The familiar requirements for patentability are that the article must be (1) useful, (2) novel, and (3) non-obvious. 35 U.S.C. §§ 101-103. Vanity Fair bases its assertion of invalidity upon the claim that the subject matter sought to be patented was "obvious" within the meaning of 35 U.S.C. § 103, which provides in pertinent part:

"A patent may not be obtained . . . if the differences between the subject matter sought to be patented

and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains."

The Supreme Court has described the nature of the inquiry into the question of obviousness as follows:

"Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or non-obviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy." Graham v. John Deere Co., 383 U.S.1, 17-18 (1966).

At the trial Vanity Fair introduced evidence regarding prior art, consisting of some 13 examples of girdles, panty girdles and briefs. Patents had been issued as to 11 of these. The only one of these garments which Vanity Fair seriously contends to have anticipated the Olga patents in question is the garment based upon Rosenthal Patent 2,763,008 previously described, which was marketed in 1955 by Maiden Form.

I find that neither the Rosenthal patent, nor any of the other examples of prior art referred to by Vanity Fair,

anticipated, or made obvious, the Olga patents.

A number of the examples referred to by Vanity Fair are girdles or panty girdles, which, as already described, are fundamentally different from the type of garment

involved in the Olga patents—the brief. These girdles and panty girdles did not include or anticipate the unique panel and leg-opening arrangements which characterized the Olga patents.

With regard to briefs, Vanity Fair has referred to a number of examples which preceded the Olga patents, including the Gossard garment referred to earlier. However, none of these briefs included or anticipated the panel and leg-opening arrangements of the Olga patents.

In connection with the Rosenthal patent, Vanity Fair relies strongly on the fact that the Patent Examiner twice rejected the Olga 301 patent claims on the basis that they had been anticipated by the Rosenthal patent. Vanity Fair asserts (and the Patent Examiner at first held) that the Olga patents were merely obvious rearrangements of elements contained in the Rosenthal patent. Vanity Fair contends that the Rosenthal and Olga designs are basically the same, except for the fact that in Rosenthal there is a panel running downward inside the girdle member, whereas in the Olga patents the downward panel runs outside the girdle member. Vanity Fair relies on cases such as Warner Bros. Co. v. American Lady Corset Co., 48 F. Supp. 417 (S.D.N.Y. 1942), aff'd, 136 F.2d 93 (2d Cir. 1943), which hold that an obvious rearrangement of familiar elements does not constitute invention.

But the American Lady case involved merely the shifting or rearrangement of panels of stretch material in the design of a corset. It is not controlling here. What is involved in the present case is a novel type of garment construction, which was far from obvious, as demonstrated by the history of unsuccessful efforts by other designers to solve certain basic structural problems.

I cannot agree that the Olga garment involved an obvious rearrangement of the elements of Rosenthal. The differences between the two garments are far more funda-

mental than simply a change in position of a panel. It is true that the Rosenthal garment contains a kind of panel running downward inside of the girdle member, whereas the Olga garment has a panel running downward outside the girdle member. But the overall result reached in the Olga garment is utterly different from the result in the Rosenthal garment. The relationship between the down-. ward panel and the girdle member in Rosenthal does not in any way create the type of flexible leg openings involved in the Olga patents, nor are such flexible leg openings even suggested by the Rosenthal design. The degree and type of stomach control are radically different in the two gar-Some indication of the distinction is given by the title of the Rosenthal garment stated in the patent application-"girdle panty garter belt." I cannot conclude that Rosenthal suggested or anticipated the Olga design.

The Patent Examiner's initial rejections of the Olga 301 patent on the basis of Rosenthal are of very little persuasive value. They were made on the basis of drawings and written descriptions, which were not fully illuminating. After the Patent Examiner had the benefit of actual sample garments

and full explanation, the 301 patent was allowed.

In any event, our Court of Appeals has recently emphasized the appropriateness of viewing prior art in the context of the problems in the particular industry or trade. In Shaw v. E. B. & A. C. Whiting Co., 417 F.2d 1097, 1104-5 (2d Cir. 1969), cert. denied, 397 U.S. 1076 (1970), the Court stated, in dealing with the patent there involved:

"Here . . . individually old concepts were combined to solve an existing problem in the art, and

Where the invention for which a patent is sought solves a problem which persisted in the art, we must look to the problem as well as to its solution if we are to properly appraise what was done and to evalu-

ate it against what would be obvious to one having the ordinary skills of the art. In re Rothermel, 276 F.2d 393, 397 47 C.C.P.A. 866 (1960).

"The district court failed to evaluate the problem posed by the prior art and appears to have relied on the proposition that, as Shaw's solution to the problem seemed a simple one, his filament was an obvious outgrowth. The simplicity of an invention or an improvement thereof is not, however, the test of its obviousness. Goodyear Tire and Rubber Co. v. Ray-O-Vac Co., 321 U.S. 275, 279, 64 S.Ct. 593, 88 L.Ed. 721 (1944). Further, the burden is on the appellee to show facts that would lead to the conclusion that appellant's product was obvious. mere recital of the known elements in the art does not, without more, invalidate the patent under Section 103. There must appear evidence that the bringing together of these elements would have been obvious. Doubt as to validity, no matter how strong, cannot justify resort to unfounded assumptions or supply deficiencies in the factual background. Graham v. John Deere Co., supra."

The Supreme Court in *Graham* v. *John Deere Co.*, 383 U.S. 1, 17-18 (1966) has described certain of the factual considerations to be taken into account—commercial success, long-felt but unsolved needs, failure of others.

When the factual background is considered, Vanity Fair's claim of obviousness with respect to the Olga patents must be rejected. The evidence demonstrates that the foundation garment industry had worked for many years to solve two problems in the design of panty briefs. It proved to be difficult to build into a light garment such as a panty brief any adequate stomach control. Also, there was the aggravation of the leg and crotch discomfort. These were basic problems, and they pertained to a type of foundation garment which was becoming more and more important as women's

outerwear styles changed to shorter skirts, increased use of

pants, etc.

The Olga design—relating to an outer panel, inside crotch piece, and girdle member in such a way as to achieve greater stomach control while affording greater leg and crotch comfort—involved a unique and novel garment structure. In 20 years or more of designing and marketing panty briefs, the foundation garment industry had not produced a design with these benefits. Whether the Olga design is the ultimate solution to the problems described above is something which I cannot, and need not, determine. What the record does show clearly is that Olga arrived at a highly original construction, which offered a solution of the stomach and leg and crotch problems in a way no other design appears to have attempted. The Olga garment has had an unusually long and successful commercial life.

The circumstances of the development of the accused Vanity Fair garment in themselves tend to negate the claim that the Olga designs were obvious. Prior to the design of the accused garment, Vanity Fair's garments partook of the typical stomach and leg problems. Vanity Fair sales executives requested the company's designers to come up with a garment which offered a better solution to these problems. What the Vanity Fair designers arrived at was none other than a garment precisely embodying the features of the Olga garment. The accused Vanity Fair garment was that company's most successful brief during the time it was marketed.

Under all the circumstances, I hold that Vanity Fair has not met its burden of proving that the matters presented in the Olga 301 and 300 patents were obvious.

One further argument of Vanity Fair must be dealt with. Vanity Fair contends that the Olga 300 patent is invalid because the Olga 301 patent constituted anticipatory prior art.

This argument must be rejected. It is true that a problem can arise when the same inventor attempts to obtain successive patents for basically the same invention. This is the problem of "double patenting", and the vice is that such double patenting may lead to a prolongation of the inventor's monopoly. Application of Braithwaite, 379 F.2d 594, 601 (C.C.P.A. 1967). But it has been held that where the inventor makes a "terminal disclaimer"—i.e., where the inventor agrees to having the second patent terminate upon the expiration date of the first patent—then both patents may be allowed. Application of White, 405 F.2d 904, 906 (C.C.P.A. 1969); Application of Braithwaite, supra.

The rule allowing two patents by the same inventor where there is a terminal disclaimer applies by analogy in the present case. Here, because the two patents were granted on the same day, both patents will automatically terminate at the same time. Thus there is no possibility that the second patent will create an improper extension of time for the monopoly. Under these circumstances, both the Olga 301 and 300 patents should be upheld.

This result accords with common sense. From a realistic standpoint, the 301 design cannot be held to be "prior art" with respect to the 300 design. Both the 301 and the 300 designs were in fact part of the same inventive process. The 300 design incorporated the elements of the 301 design and made a substantial improvement. For the purposes of patent validity, both designs and both patents should be treated together, as the Patent Office ultimately did in granting the two patents on the same day.

For the above reasons, I hold that Vanity Fair has not proved the invalidity of the Olga 301 and 300 patents.

Infringement

Vanity Fair's only defense to Olga's counterclaim for infringement is the contention that the Olga patents are

invalid. My rejection of Vanity Fair's claim of invalidity necessarily resolves the infringement question. In any event, it is clear that the accused Vanity Fair garment contains the essential patented features of the Olga 301 and 300 patents. Vanity Fair is thus liable for infringement.

Damages

Assessment of damages for infringement is governed by 35 U.S.C. § 284, which provides:

"Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

"When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed.

"The court may receive expert testimony as an aid to the determination of damages or of what royalty

would be reasonable under the circumstances."

The statute provides that damages shall be no less than a reasonable royalty. The evidence shows that Vanity Fair was selling its briefs at \$45.00 per dozen. The 12,455 dozen briefs sold by Vanity Fair were thus sold for \$560,475. The evidence presented by Olga would justify a royalty rate of 5%. Such a royalty on sales of \$560,475 would be \$28,024.

Olga concedes that any lost profits did not exceed this royalty figure. Thus the amount of damages awarded to Olga is \$28,024. In addition, interest is awarded from January 1, 1968—the median point for the infringement.

Amended Opinion February 21, 1974.

Olga has requested application of the statutory provision for award of treble damages. In my view, the circumstances of this case do not justify trebling.

Conclusion

Vanity Fair's complaint charging the invalidity of Olga patents 3,142,301 and 3,142,300 should be dismissed. Olga is entitled, on its counterclaim, to a declaration of the validity of the patents and an injunction against Vanity Fair prohibiting further infringement. Olga is further entitled to damages in accordance with this opinion.

Dated: New York, New York, February 21, 1974.

THOMAS P. GRIESA THOMAS P. GRIESA U.S.D.J.

Notice of Appeal, February 21, 1974.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

VANITY FAIR MILLS, INC.,

Plaintiff,

vs.

OLGA COMPANY (INC.),

Defendant.

Notice of Appeal to Court of Appeals Under Rule 3 FRAP

Notice is Hereby given that Vanity Fair Mills, Inc., plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment entered in this action on January 23, 1974.

WILLIS H. TAYLOR, JR.
PENNIE & EDMONDS
330 Madison Avenue
New York, New York 10017
Attorneys for Plaintiff

New York, New York, February 21, 1974.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Notice Of Appeal To Court Of Appeals Under Rule 3 FRAP on White And Coch, attorneys for defendant, by causing a copy thereof to be delivered to their offices at 24 Fifth Avenue, New York, New York 10011.

Dated: February 21, 1974.

PHILIP T. SHANNON

Notice of Appeal From Amended Judgment.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civ. 4181

VANITY FAIR MILLS, INC.,

Plaintiff,

vs.

OLGA COMPANY (INC.),

Defendant.

AMENDED NOTICE OF APPEAL TO THE COURT OF APPEALS UNDER RULE 3 FRAP

Notice is Hereby given that Vanity Fair Mills, Inc., plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the Amended Judgment entered in this action on February 21, 1974.

WILLIS H. TAYLOR, JR.
PENNIE & EDMONDS
330 Madison Avenue
New York, New York 10017
Attorneys for Plaintiff

New York, New York, March 19, 1974.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Notice Of Appeal To Court Of Appeals Under Rule 3 FRAP on Nicholas L. Coch, Esq., Anderson, Russell & Kill, 600 Fifth Avenue, New York, New York 10022 and Stuart White, Island Falls, Maine 04747.

Dated: March 19, 1974.

PHILIP T. SHANNON

Stipulation Dated March 29, 1974 Staying Execution of Damage Award and Enforcement of Injunction.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STIPULATION

Whereas, a judgment awarding damages in the amount of \$31,000 to defendant was entered in the present action on January 23, 1974; and

Whereas, said judgment was amended by order of the Court on February 22, 1974 correcting the damage award to \$28,024; and

WHEREAS, plaintiff, Vanity Fair Mills, Inc. discontinued marketing the garment found to be an infringement of defendant, Olga Company's patent Nos. 3,142,301 and 3,142,300 in 1969,

It is hereby stipulated and agreed by and between counsel for the parties herein that the execution of the damage award and the enforcement of the injunctive provisions of the amended judgment herein be and the same hereby are stayed pending the final determination of plaintiff, Vanity Fair Mills, Inc.'s appeal from said amended judgment to the United States Court of Appeals for the Second Circuit.

Stipulation Dated March 29, 1974 Staying Execution of Damage Award and Enforcement of Injunction.

It is further stipulated and agreed by and between counsel for the parties that the time to docket the record on appeal herein is extended to May 2, 1974.

New York, New York March , 1974.

Pennie & Edmonds
Willis H. Taylor, Jr.
Willis H. Taylor, Jr.
330 Madison Avenue
New York, New York 10017
Attorney for Plaintiff

New York, New York March 28, 1974.

> NICHOLAS L. COCH Nicholas L. Coch 600 Fifth Avenue New York, New York 10022 Attorney for Defendant

Dated: New York, New York, March 29, 1974.

> THOMAS P. GRIESA United States District Judge

> > EJ.

Stipulation Dated April 30, 1974 Re Transmittal of Trial Exhibits.

Filed April 30, 1974

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SAME TITLE

STIPULATION

It is hereby stipulated and agreed by and between the parties herein through their respective counsel that plaintiff's trial exhibits 1 through 27, 29 through 34 and 36 through 40 and defendant's trial exhibits A through D and F through G shall be transmitted with the record on appeal in the above case to the clerk of the Court of Appeals for the Second Circuit.

It is further stipulated and agreed that defendant's trial exhibit E which was marked for identification and not received into evidence at trial may also be transmitted with the above exhibits and record on appeal in this case.

New York, New York, April 30, 1974.

Pennie & Edmonds Willis H. Taylor, Jr. Willis H. Taylor, Jr. 330 Madison Avenue New York, New York 10017 Attorney for Plaintiff

New York, New York, April 30, 1974.

Nicholas L. Coch Nicholas L. Coch 600 Fifth Avenue New York, New York 10022 Attorney for Defendant

Dated: New York, New York

, 1974.

/s/ Thomas P. Griesa United States District Judge

Testimony.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civ. 4181

[SAME TITLE]

January 29, 1973, 10 A.M.

Before:

Hon. Thomas P. Griesa, District Judge.

APPEARANCES:

Pennie, Edmonds, Morton, Taylor & Adams, Esqs., Attorneys for plaintiff,

By: Willis H. Taylor, Esq. and Philip T. Shannon, Esq.

STUART A. WHITE, Esq.,

NICHOLAS L. COCH, Esq.,

Louis J. Bachand, Jr., Esq., Attorneys for defendant.

(2) Mr. Taylor: We have one question that hadn't been determined and that is the order of proof which I submitted a memorandum and there has been no opposition, so I assume the plaintiff will have the right to proceed or to close the case.

I think first, your Honor, what I think I ought to do is to get rid of all the exhibits. I have them all ready and ready to be marked.

The Court: Hasn't that been done?

Mr. Taylor: No, it has not, unfortunately. I was perfectly willing to do it at any time, but we haven't been permitted by the court or at least haven't been invited to do it, so—

The Court: This is something you can always do, premark the exhibits.

Mr. Taylor: They have all been listed in my notices and whatnot. The only thing remains is to actually offer them.

The Court: All right, go ahead.

This is a non-jury case.

Mr. Taylor: Non-jury case.

The Court: I am going to be the finder of fact. I am not going to permit either side to put in voluminous exhibits without directing my attention right here and now to (3) the portions I am to rely on, and if there are things that should be subject to agreed summaries I am going to ask you during the evenings or luncheons that you work out agreed summaries.

In other words, the matters for adjudication should be limited really to matters in controversy. If there is a lot of basic material, and I gather there is from both of your proposed findings, that isn't in controversy, then let us not waste time boxing about that.

Go ahead with your exhibits. The only thing I am going to ask you to do is to direct my attention to the—

Mr. Taylor: There is nothing in controversy. They have all been noted in pre-trial memoranda and whatnot, so all we have to do is the actual offering in the court to have an actual—

The Court: With the designation of the parts you rely on and the parts that Mr. White relies on.

Mr. White: May I speak to the question of the exhibits?

The Court: Right.

Mr. White: Mr. Taylor is not correct in saying that

there is no dispute about his exhibits.

Mr. Taylor, in an attempt to show that this patent is old, has had recently under his own direction and specifically (4) for purposes of argumentation made up a whole lot of garments that he wants to use as evidence why this patent is invalid.

Mr. Taylor: No

Mr. White: Mr. Taylor, may I please finish.

The Court: I don't think there is any need for argument about this. I think he ought to offer these exhibits and you can object to them as they come in.

Mr. White: I rather have him do it with witnesses, but I don't care. I will sit down.

It will save time, your Honor, if when he has a witness and wants to put in an exhibit he offers it.

The Court: I take it that will be the ground of your objection, that there is no foundation if there isn't.

Mr. White: That's correct.

The Court: All right. Let us go.

Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 1 Olga Erteszek patent number 3,142,301 in suit.

Mr. White: No objection.

(Plaintiff's Exhibit 1 received in evidence.)

Mr. Taylor: I offer in evidence the certified copy of the file history of patent number 3,142,301 just marked Plaintiff's Exhibit 1.

Mr. White: No objection.

(5) (Plaintiff's Exhibit 2 received in evidence.)

Mr. Taylor: May I explain, the certified file history, is the proceedings in the Patent Office leading to the grant of Plaintiff's Exhibit 1.

I offer in evidence as Plaintiff's Exhibit 3—

The Court: Just a moment. You will have to give us a little time.

Mr. Taylor: Plaintiff's Exhibit 3, U.S. patent number 3.142.300 of Olga Erteszek.

Mr. White: No objection to 3.

(Plaintiff's Exhibit 3 received in evidence.)

The Court: Mr. Taylor, you will have to go a little slower for me. I am going to have these exhibits received and I want to look at them before you look at the next exhibit. I have 1 and 2.

Mr. Taylor: I have 3 and 4.
Mr. White: No objection to 4.

(Plaintiff's Exhibit 4 received in evidence.)

The Court: Could I ask counsel if there is way to direct my attention to the portions of these exhibits that you are going to rely on?

Mr. Taylor: No.

The Court: For instance, as I understand the case from —I didn't understand the papers, I am sure, completely (6) because verbal descriptions are not as good as photographs and so forth, but I did get the idea or at least a main problem here is whether the placing of the elastic piece over the body of the garment in the way it was placed was a patentable innovation.

Is that basically it, Mr. White? Mr. White: Essentially.

The Court: And then the element of having the crotch piece, which was either in the original 301 or maybe this was an improvement in the 300, whether the crotch piece which gave abdominal support, whether that was a patentable innovation.

Mr. White: That's correct.

The Court: It would focus at least better for you and I think make you both sure of getting some kind of a clear decision from me if I could be directed to the parts of these documents that bear on that issue or those issues. You can do it now or have an expert witness do it or give me a memorandum, but I think it would help me a great deal to have my attention focused on the portions of these long documents that bear on the matters in dispute.

I am sure there are lots of things in these documents that have no bearing on what we are really disputing about.

(7) What part of Exhibit 1, for instance, relates to this

dispute?

Mr. Taylor: It is very difficult, if your Honor please, to say other than the—you see, ultimately the point that the court must decide is whether the subject matter defined by the claims is patentable over the prior art or as the statute 1-3 puts it whether or not it was obvious over the prior art.

The Court: That's right.

Mr. Taylor: In order to understand the claim language of the patents, which is the ultimate summary, you might say, or what the court has to consider from the standpoint of validity or invalidity, is defined in the claims themselves.

However, the specification is the explanatory or descriptive portion of the patent which determines whether or not the meaning of the claims would be obvious or not to some-

one looking at the patent.

So that there is no way that I know of of actually saying to your Honor, "Well, it is paragraph 4, column 2," and so forth that relates wholly to claim 1 and so forth with respect to claim 2 of the 301 patent, which is the one we are now discussing. So that I don't know that it is possible to delineate in the specification of the patent that (8) particular portion which is recited in the claims, because since this is a combination patent of a group of old elements, none of the elements of the arrangement are new—

The Court: I won't interfere with your proof. I have somewhat of an affirmative response from Mr. White and if Mr. White feels that he can direct my attention to the parts that relate to the dispute, that would be a help and maybe later on you can think about the same thing, Mr. Taylor, but I won't interfere with you now. Go ahead with your exhibits.

Mr. Taylor: How far are we?

The Court: We are through with 4. Exhibits 1 through

4 are in evidence.

Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 5 U.S. patent number 2,763,008 of Rosenthal for girdle panty garter belt, filed September 28, 1954, granted September 8, 1956.

Mr. White: No objection. The Court: Received.

(Plaintiff's Exhibit 5 received in evidence.)

Mr. White: May I say, your Honor, that our proposed findings call the court's attention to those specific lines of those patents that we deem relevant to the issues.

The Court: All right. I think that is probably (9) right. Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 6 U.S. patent number 2,125,482 of Barnes for body garment, filed July 20, 1937, granted August 2, 1938.

Mr. White: No objection.

The Court: All right. Received.

(Plaintiff's Exhibit 6 received in evidence.)

Mr. Taylor: I offer as Plaintiff's Exhibit number 7 U.S. patent number DES 174,054 of Peck, assigned to Gossard, filed April 2, 1954, granted February 15, 1955.

The Court: What does DES mean?

Mr. Taylor: Design.

The Court: What is the significance of this? You just have to help me out.

These all relate to design, as far as I can see.

Mr. Taylor: That is true.

The Court: Why do they use a DES symbol?

Mr. Taylor: That is because there are two kinds of patents that may be obtained, one a mechanical patent, which bears an order number, and if you apply for a design patent, why, the patent then is designated as number DES with a number.

The Court: What are these others? These others are mechanical patents?

(10) Mr. Taylor: That's right.

As a matter of fact, they are all designs from the standpoint of garments. That is the only way in which you can really describe how a garment is made.

Mr. White: Your Honor, I guess Mr. Taylor is combining an argument with introducing exhibits and that is the reason I am popping up every now and then.

The Court: I asked a question. Can you throw any light on that?

Mr. White: I would like to.

The difference is a regular patent which we call a mechanical patent within the context of this litigation is intended to cover and to be judged by some actual function that it performs, whereas a design patent is a different breed of thing. It runs only 14 years. It is a different kind of patent and that is judged entirely and solely from the aesthetic visual, ornamental standpoint.

The Court: All right. We are now up to Exhibit 7.

Mr. Taylor: Any objection?
Mr. White: No objection.
The Court: 7 is received.

(Plaintiff's Exhibit 7 received in evidence.)

Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 8 U.S. patent number 2,663,871, of Olga Erteszek for (11) foundation garment, filed October 12, 1951, granted December 29, 1953.

Mr. White: No objection.
The Court: Received.

(Plaintiff's Exhibit 8 received in evidence.)

Mr. Taylor: I offer in evidence as Plaintiff's Exhibit number 9 U.S. patent number 2,872,927 of Olga Erteszek for girdle structure, filed September 19, 1957, granted February 10, 1959.

Mr. White: No objection.
The Court: Received.

(Plaintiff's Exhibit 9 received in evidence.)

Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 10 U.S. patent number 2,531,772 of Olga Erteszek for panty girdle, filed July 23, 1947, granted November 28, 1950.

Mr. White: Objection.

The Court: That is as to Exhibit 10 for identification?

Mr. White: Yes.

The Court: What is the objection on that?

Mr. White: Failure to comply with 35 USC, Section 282, your Honor, which provides in actions involving the validity or infringement of a patent, the party asserting invalidity or non-infringement—and in this case it is the (12) other side here—give notice in the pleadings or otherwise in writing to the adverse part at least 30 days before the trial of the country, number, date and name of the patentee of any patent—to be relied upon as anticipation of the patent in suit or—as showing the state of the art.

That was not done in this case.

The Court: What did you give your designation on

Exhibit 10. Mr. Taylor?

Mr. Taylor: That is a patent which was taken out by the patentee of the patents in suit so that it is not within the purview of the lack of notice to the other side, so as far as 282 is concerned it is my position that you do not have to give notice of a patent that is actually granted to the patentee of the patents in suit.

The Court: As far as the notice, you concede you gave

no such notice?

Mr. Taylor: That's correct, your Honor. Of course, it is within the court's discretion in any instance, but, of course, we have been filing with the defendants our proposed findings of fact and our arguments and whatnot for a good many years so that there is no surprise as far as they are concerned with respect to those patents.

The Court: Have you referred to this Exhibit 10 patent

at all?

(13) Mr. Taylor: No-oh, yes, indeed. In both my proposed findings and in my trial brief which your Honor has.

Mr. White: And I might agree with Mr. Taylor, your

Honor, that it is discretionary.

The Court: Can you direct my attention to where you refer to it in your proposed findings and in your trial krief?

Mr. Taylor: Yes. In the pre-trial brief it is easier.
Mr. White: They are not in the findings, Mr. Taylor,

only the brief.

Mr. Taylor: I refer to page 22 of my trial brief, which begins by reference to 2,732,556 at the top of the page, 2,531,772.

The Court: What page? Mr. Taylor: Page 22.

The Court: What about his point-

Mr. White: If the Court were disposed to exercise its discretion to allow this, we would not be the least bit offended.

There are going to be a lot of these things where Mr. Taylor is going to be making some shortcuts and I just

didn't want to let the first one go by.

(14) The fact is it was our garment. It has not got a thing to do with the invention and we can explain it from the witness stand and that will take ten minutes, whereas if we proceed along this argument it is going to take 15.

The Court: I think you are right. All right, received.

(Plaintiff's Exhibit 10 received in evidence.)

Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 11 U.S. patent number 2,660,173 of Olga Erteszek for disposal inset panty garment, filed February 4, 1952, granted November 24, 1953.

Mr. White: We waive the same objection, your Honor.

The Court: Received.

(Plaintiff's Exhibit 11 was received in evidence.)

Mr. Taylor: I offer in evidence U.S. patent number 2,732,556 of Olga Erteszek for girdle, filed March 7, 1955, granted January 31, 1956.

Mr. White: The defendant waives the same objection

on that one.

The Court: All right, received.

(Plaintiff's Exhibit 12 received in evidence.)

Mr. Taylor: I offer in evidence as Plaintiff's (15) Exhibit 13 the Gossard advertisement in Industry Publication corsets and brassieres for January, 1954, page 11, for April, 1954, page 8 and June, 1955, page 8 and 9.

Mr. White: No objection.

(Plaintiff's Exhibit 13 received in evidence.)

Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 14 Maiden Form (Rosenthal) advertisement in Industry Publication corsets and brassieres for April, 1955, second inside cover.

Mr. White: No objection. The Court: Received.

(Plaintiff's Exhibit 14 received in evidence.)

Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 15 garment bearing patent number 3,142,301, Olga, described in figures 1, 2, 3, 4 of the application for patent, filed November 20, 1962 (heretofore marked Plaintiff's Exhibit 3 for identification Olga Erteszek Deposition of July 23, 1968).

The Court: This is the garment made from patent 301?

Mr. Taylor: That's right.
The Court: Any objection?
Mr. White: No objection.
The Court: Received.

(16) (Plaintiff's Exhibit 15 received in evidence.)

Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 16 garment bearing Olga and trademark Tummy Brief and marked with patent numbers 3,142,300 and 3,142,301 (heretofore marked Plaintiff's Exhibit 6 for identification Olga Erteszek Deposition of July 23, 1968).

Mr. White: No objection. The Court: Is this—

Mr. White: That has both features.

The Court: In other words, this has the features of 300 and 301?

Mr. Taylor: Yes. This has the additional crotch piece in the garment.

The Court: All right. Received.

(Plaintiff's Exhibit 16 received in evidence.)

Mr. Taylor: I offer in evidence as Plaintiff's Exhibit

Mr. White: There are going to be objections to these I think.

The Court: You make your offer and then Mr. White will object.

Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 17A and 17B two garments patterned after Maiden Form garment—

(17) The Court: Let us take 17A first.

Mr. Taylor: 17A is the Rosenthal patent 2,763,008 with the front panel inside the garment as in figures 1 and 3, and the other with the front panel outside.

The Court: Wait a minute. Just deal with A.

Mr. Taylor: A is as in the Rosenthal patent with the panel inside, figures 1 and 3, and 17B with the front panel outside.

The Court: So you are saying that both 17A for identification and 17B for identification are made based upon the Rosenthal patent in Exhibit 5, right?

Mr. Taylor: That's correct. The Court: Any objection?

Mr. White: Yes, your Honor. There is no foundation for that.

The Court: All right, sustained for the present. You have to lay a foundation.

Mr. Taylor: I don't see how there can be any objection to 17A, because that is precisely the Rosenthal structure.

The Court: Unless Mr. White would agree to it, I would have to have evidence about that.

Mr. Taylor: Yes. It will be identified.

The Court: All right. I will sustain the objection.

(18) Mr. Taylor: I would suggest we mark 17A in evidence and 17B for identification.

Mr. White: No.

The Court: He has objected, so you will have to have a foundation for both A and B.

Mr. Taylor: All right.

Then I offer in evidence as Plaintiff's Exhibit 18 garment labeled Jantzen, 2231, style S-1, sports brief controller by Jantzen, and original box.

Mr. White: May we see that one, please?

Mr. Taylor: I am now exhibiting to Mr. White the garment which I am about to offer and have offered as Plaintiff's Exhibit 18 labeled Jantzen.

The Court: What is your description of 18? I didn't

get it.

Mr. Taylor: 18 is garment labeled Jantzen, 2231, style S-1, sports brief controller by Jantzen, in the original box.

The Court: What patent is it made from?

Mr. Taylor: It is made from a Jantzen garment, and I don't have a patent for it. It was a garment made and sold for many, many years. This was the famous Jantzen brief adapted for use under Jantzen's bathing suits.

Mr. White: Mr. Taylor, I didn't hear that last (19)

speech, but we have no objection to this garment.

The Court: All right. Exhibit 18 is received.

(Plaintiff's Exhibit 18 received in evidence.)

Mr. White: Is it a prior art thing, is that the thing?

Mr. Taylor: Yes.

Mr. White: I was showing it to my client, your Honor,

and I was not able to listen to the description.

Mr. Taylor: It is. It is one of the oldest briefs made. I think, your Honor, I would prefer to have these marked for identification. I don't want to mark them in evidence because they really have no evidentiary value, except as a convenience for putting the garment on the forms.

The Court: They don't have to have a separate number. Is there any reason to have any identification at all on

these?

Mr. White: No.

Mr. Taylor: All right, we will skip it.

May I make a note on the record that it has been determined unnecessary to mark the two forms which may display the garment.

The Court: They have no number in this case so (20)

just renumber your subsequent exhibits.

Mr. Taylor: Then I will offer as Plaintiff's Exhibit 19 a garment like that marked Plaintiff's Exhibit 15 for identification, but with front panel reversed in underlying girdle portion.

The Court: Repeat that. I just didn't get that descrip-

tion.

Mr. Taylor: This is a garment like that marked Plaintiff's Exhibit 15, but with the front panel reversed and underlying girdle portion.

Mr. White: No foundation on that, your Honor. I ob-

ject to it for the time being.

The Court: Sustained for the present, Mr. Taylor.

Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 20 the garment labeled Gossard and Gossard DEB marked Plaintiff's Exhibit 2 for identification in the Olga Erteszek deposition of July 23, 1968.

Mr. White: Objected to for lack of foundation, your

Honor.

The Court: All right. Sustained for the present.

Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 21 Olga garment style 447, marked Plaintiff's Exhibit JE-2

for identification, John Erteszek deposition of May 12, 1969.

(21) The Court: Tell me the description again. Mr. Taylor: It is the Olga garment style 447.

Mr. White: Objected to. Irrelevant, incompetent and immaterial.

Mr. Taylor: May I say to your Honor that-

The Court: I'm sorry. Does it come from one of these

Olga patents that you introduced?

Mr. Taylor: No, no. It is a garment made which will be identified in listing of the garment made by Olga which will be offered ultimately as Plaintiff's Exhibit 22.

Mr. White: Your Honor, this came after the invention

we are talking about.

The Court: Excuse me, but I didn't even get a basic description.

You used a number. What was the number you were

talking about?

Mr. Taylor: The number I was talking about was the style 447, marked Plaintiff's Exhibit JE-2 for identification in the John Erteszek deposition of May 12, 1969.

The Court: The objection is sustained for the present.

Mr. Taylor: May I have it marked and so forth.

The Court: Mark it for identification. You lay your foundation for it.

(22) (Plaintiff's Exhibit 21 was marked for identifica-

tion.)

Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 22 a sheet illustrating and describing Olga garment style numbers 446 and 447 and others marked Plaintiff's Exhibit JE-3 for identification, John Erteszek deposition of May 12, 1969.

Mr. White: May I see it, please?

Mr. Taylor: Surely.

Mr. White: No objection to this document insofar as it relates to the patented garment which is style number 446.

The remainder is objected to as incompetent, irrelevant and immaterial.

The Court: What is style 446?

Mr. White: That is the patented one, your Honor.

Mr. Taylor: That is the subject of patent number 300 in suit.

Mr. White: It is the one with both features on it.
The Court: Exhibit 16 is the one with both features.

Mr. White: Yes, your Honor. The other one was not commercial by itself.

The Court: You are not objecting to the portion of Exhibit 22 that describes style 446, right?

(23) Mr. White: That's correct. The rest of it we don't see any relevancy to.

The Court: What is the relevancy to the rest? What is the relevancy of anything about 447, Mr. Taylor?

Mr. Taylor: Merely that it is the girdle companion of the 446 garment and the only thing missing from 446 that is in 447 is the crotch piece.

The Court: I will admit Exhibit 22 insofar as it relates to 446 and you will have to lay a foundation on any other portion you want to introduce.

Mr. Taylor: Of course, there was no objection made at all at the time I was examining Mr. John Erteszek on his deposition.

The Court: Depositions are different.

Mr. Taylor: So I can point to that as a means of establishing the fact that this is the first time that that has been objected to.

The Court: The deposition is not in evidence. As of the present moment Mr. White says there is no foundation and he is correct as far as we stand right now. If you want to use the deposition or some other means to lay a foundation you can certainly do so.

Mr. Taylor: Okay.

(Plaintiff's Exhibit 22 received in evidence.)

(24) Mr. Taylor: As Exhibit 23, Vanity Fair garment, label style 4028, EST 940-7 marked Defendant's Exhibit F for identification.

Mr. White: No objection, your Honor. That is the one that infringes.

The Court: What is the problem?

Mr. Taylor: We are looking for Vanity Fair garment style 4028 marked Defendant's Exhibit F for identification.

Do you have that?

Mr. White: We have one which we will give you to put in evidence. It is what the case is all about, your Honor.

That is not the one that has that deposition number on it, but it is the same garment.

The Court: All right, that is perfectly all right.

Mr. Taylor: If your Honor will just pardon me a moment, I am sure we can locate it.

May I have the right to substitute the other garment when the time comes?

The Court: You certainly may.

(Plaintiff's Exhibit 23 received in evidence.)

Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 24 Vanity Fair garment style 4028 with unstitched (25) outermost panel marked Defendant's Exhibit J for identification.

Mr. White: No objection.

(Plaintiff's Exhibit 24 received in evidence.)

Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 25—

The Court: What is the significance of 24?

Mr. Taylor: Only that it shows that the outermost panel in the structure of 4028 really produces no effect whatsoever.

The Court: You will have to explain that with testimony.

Do I understand you have no objection to 24, Mr. White? Mr. White: Is that the one that your Honor is now looking at?

The Court: It is the one with the panel disengaged. Mr. White: No. It has been explained what it is.

The Court: All right.

Mr. Taylor: Now I offer in evidence as Plaintiff's Exhibit 25 Vanity Fair garment labeled 31-1, 61-32A marked Defendant's Exhibit G for identification.

The Court: What is the Vanity Fair number? Mr. Taylor: Vanity Fair label 31-1; 61-32A.

(26) Mr. White: No objection. The Court: All right, received.

(Plaintiff's Exhibit 25 received in evidence.)

Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 26 Vanity Fair garment labeled 31-6, EST 61-52 marked Defendant's Exhibit H for identification.

Mr. White: No objection.

The Court: All right, received.

(Plaintiff's Exhibit 26 received in evidence.)

Mr. Taylor: I now have found-

The Court: Do you want to substitue Exhibit 23?

Mr. Taylor: Yes.

Mr. White: Your Honor, could I please see Exhibit 24

before 23 is handed up? The Court: Yes.

(Handing.)

Mr. White: Did I say no objection? I have none.

The Court: 24 is admitted. I think you said no objection.

Mr. White: I have none on either one of them.
The Court: Are we substituting a different 23?
Mr. Taylor: The same model and the same design.

The Court: All right. You found the one from the deposition?

(27) Mr. Taylor: That's right.

Mr. White: Mr. Taylor, may I ask a question about 23 and 24 for the record just so I will understand it?

Are 23 and 24 identical in every respect save one, namely, that in 24 the panel has been unstitched?

Mr. Taylor: That is my understanding. That unstitching was effected during one of the depositions.

Exhibit 27 I offer in evidence Vanity Fair garment labeled style 4050, EST 61-79, marked Defendant's Exhibit I for identification.

The Court: At the deposition, right?

Mr. Taylor: That's right. Mr. White: No objection.

The Court: All right, received.

(Plaintiff's Exhibit 27 received in evidence.)

Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 27 Vanity Fair garment style 51-28, marked Defendant's Exhibit K for identification.

Mr. White: Objected to, your Honor. Irrelevant, incompetent and immaterial.

The Court: 27 is Vanity Fair number 40-50, right?

Mr. Taylor: Right.

The Court: That has been received.

28 is Vanity Fair-

(28) Mr. Taylor: 51-28.

The Court: That is objected to.

Mr. Taylor: That is one of their own exhibits which they brought in and asked me to produce during the course of the depositions.

The Court: Again, a deposition is different from a trial. What is the ground of your objection, irrelevancy?

Mr. White: Yes, your Honor. It relates to a different garment.

The Court: We have to have some foundation evidence. Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 29 Vanity Fair garment style 941-37A marked Defendant's Exhibit L for identification.

Mr. White: Objected to as irrelevant.

The Court: All right, sustained for the present.

Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 30 Vanity Fair garment style 940-4 marked Defendant's Exhibit M for identification.

Mr. White: No objection.

(Plaintiff's Exhibit 30 received in evidence.)

The Court: I guess there is some convenience of having them in, but you are going to have to have testimony (29) about every single one of them before they mean anything at all, except possibly the patents. Perhaps you would want to wait until you have testimony about it.

You are going to have testimony about these garments?

Mr. Taylor: Certainly.

The Court: How many more exhibits do you want to

put in?

Mr. Taylor: I have from 31 to 41 in the form of catalogs which were asked to be produced by the defendant and I now offer Vanity Fair catalog for spring and summer 1964.

The Court: Is it necessary? We have spent almost an hour doing nothing but exhibits and that, I guess, is some

work accomplished, but couldn't you introduce them during the course of testimony so we can get started with some witnesses?

Mr. Taylor: I have some that I would like to offer because there may be some objection and I would like to know whether or not—

The Court: All right, go ahead.

Mr. White: Don't offer any just because you think we want to do it, Mr. Taylor, that is the point because maybe we don't.

(30) Everything we asked to produce on discovery does not mean we want to put it in the record during the trial.

Mr. Taylor: It seemed to me that the course of the deposition is that this was made a very critical matter and the only point—

The Court: You introduce what proof you think you have to sustain your case and that is all you need to introduce, but that is up to you.

Mr. Taylor: Then on the record I would like to say that I have here ready for offering Vanity Fair catalogs ranging from the spring and summer of 1964 to the spring and summer of 1969, which totals 11 in all.

The Court: All right. You will produce those to the defendants.

Mr. Taylor: Yes.

Now I would like to ask to be considered offered in evidence Plaintiff's Exhibit 31 Olga spring 1972 catalog.

Mr. White: Objected to, your Honor.

The Court: Let us have it marked for identification.

(Plaintiff's Exhibit 31 marked for identification.)

Mr. Taylor: That is their own catalog which, of course, includes reference to the Olga 447 brief.

(31) The Court: I will sustain the objection for the moment.

Mr. White: I just want to know what he wants to say about it is all, your Honor.

Mr. Taylor: It shows that Olga is introducing a new brief just as I explained Vanity Fair has done, so while they do illustrate the 446 brief in the catalog, I am sure that the evidence may show that there is no demand for it and that it is there merely to show a continuity of the offering by Olga of the subject of the 300 patent.

Mr. White: Withdrawn. Withdrawn. The Court: Objection withdrawn?

Mr. White: Yes.

The Court: I must say, Mr. Taylor, you are going to have to have testimony about the significance of that.

Mr. Taylor: That's right. Oh, yes.
The Court: But the exhibit is received.

(Plaintiff's Exhibit 31 received in evidence.)

Mr. Taylor: Then I offer in evidence as Plaintiff's Exhibit 32 Olga garment wonder pants, style 407, referred to at page 9 of Olga catalog spring of 1972 now marked Plaintiff's Exhibit 31.

(32) The Court: Any objection?

Mr. White: No, your Honor, but I can't help but think that—

The Court: All right, received.

(Plaintiff's Exhibit 32 received in evidence.)

Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 33 the Vanity Fair spring and summer of 1970.

Mr. White: Objected to, your Honor.

The Court: What is it?

Mr. Taylor: That shows the discontinuance in the line of the 4028.

Mr. White: I object to it. The Court: It is a catalog?

Mr. Taylor: It is a formal catalog for Vanity Fair for the spring and summer of 1970 which does not contain any reference to 4028.

Mr. White: We will stipulate that in that catalog there is no offer for sale of the accused garment and object to the exhibit.

The Court: You will stipulate that in the spring and summer catalog of Vanity Fair for the year 1970 there was no offer of the alleged infringing garment, right?

Mr. White: I am taking it on faith. Maybe I should look.

(33) Mr. Taylor: Because it was discontinued in 1969. The Court: Because it was discontinued in 1969. Is that agreeable to you, Mr. White?

Mr. White: No. I think we will have to get some testimony on that, your Honor.

Mr. White: All right. We don't object to the catalog— The Court: There is no stipulation. He does not object to the catalog.

Is that right?

Mr. White: Yes, your Honor. I think it may be relevant, of course, whether they discontinued it, but I don't think they need to clutter the record with a catalog to prove it. I don't object.

The Court: The catalog is received. You will have to introduce whatever proof you have about the discontinuance.

(Plaintiff's Exhibit 33 received in evidence.)

Mr. Taylor: Then I offer in evidence the Vanity Fair spring-summer of 1972 catalog as Plaintiff's Exhibit 34.

Mr. White: No objection. The Court: Received.

(Plaintiff's Exhibit 34 received in evidence.)

(34) Mr. Taylor: I offer in evidence as Plaintiff's Exhibit 35 Vanity Fair garment 40-030, referred to at page 10 of Vanity Fair catalog spring-summer of 1972 now Plaintiff's Exhibit 34.

Mr. White: Objected to, your Honor.

The Court: All right. Sustained for the moment.

This is a garment, you say, that is referred to in the spring and summer catalog of 1972?

Mr. Taylor: Yes, of 1972.

The Court: What is the number of the garment?

Mr. Taylor: The garment is 40-030.

The Court: The objection is sustained for the moment.

Is that all?

Mr. Taylor: Yes, that is all I have for the moment. The Court: Would you put on your first witness.

Mr. Taylor: Yes, I would like to.

I call Mr. Lands.

Grover H. Lands, called as a witness, having been duly sworn, testified as follows:

Direct Examination by Mr. Taylor:

- (35) Q. Mr. Lands, will you state your full name and residence? A. Grover H. Lands, 2 Huckleberry Lane, Greenwich, Connecticut.
- Q. And by whom are you employed, if you are employed? A. Vanity Fair Mills, Inc.
- Q. How long have you been employed by Vanity Fair Mills, Inc.? A. In excess of 11 years. 11, 12 years.
- Q. And would you be good enough to state the nature of the duties which you perform or are asked to perform with Vanity Fair Mills commencing with your first em-

ployment? A. I came as a foundation representative to help them develop the foundation collection that they were entering into at the time.

Subsequently I was appointed an assistant sales manager and subsequent to that appointed merchandise man-

ager, the title I currently carry.

Q. Would you state, if you will, the various types of garments which you have been familiar with manufactured by Vanity Fair Mills, Inc. over the period that you have stated? (36) A. They make brassieres of all basic types, both short, bando long, strapless, etc. They make girdles, panty girdles, briefs, corsets, panty corsalettes.

In day wear they make panty briefs, bikinis, skirts, slips,

day wear in general.

In sleep wear, they make all forms of sleep wear from the various types gowns, peignoir, both short and long.

In the robe classification, which becomes lounge wear in part, they have various types of sleep and at home entertaining lounge wear, plus scuffs.

Q. In the course of your explanation just given, you mentioned three types of garments, girdles, panty girdles and briefs.

Will you first define or describe very broadly the nature of the girdle garment. A. Well, the girdle concept is a very broad name applied to all styles generically. However, specifically a girdle is an open bottom device with an encircling elastic member to control around the abdomen, the hips and the derriere without having a closed bottom.

The panty girdle essentially is the same, but it has an

extension of legs and a closed or split crotch.

The little brief is actually a girdle with an (37) attached crotch piece running between the legs to hold it down or to lock it into position.

Those are the three basic garments.

The Court: I don't get the difference between

panty girdle and brief.

The Witness: The brief has no leg to speak of in it, your Honor, it has a very short leg, where the panty girdle has an extended elastic down each leg to control the thigh area rather than the abdomen, derriere and such.

Q. For how long a period have garment manufacturers been making the three types of garments, namely, the girdle, the panty girdle and the brief, to which you have referred? A. I couldn't specify exactly, but it certainly

goes back into the '30s, early '40s.

Q. Mr. Lands, I exhibit to you a copy of Plaintiff's Exhibit 1, U.S. patent number 3,142,301 of O. Erteszek for elasticized panty garment, and I will ask you to state whether or not you have read the patent and understand it. A. I have read it and insofar as I can understand the legality and the legal explanation of it, yes, I do. sir

(38) Q. Will you characterize the garment which is illustrated in the drawings of the patent? A. You want

just a general description?

Q. Yes, just a general description. A. It is an elasticized brief encircling the body as in the form of a standard girdle with the attachment of an overlaid panel elasticized in the front that goes down and forms a crotch piece thus making it, in my opinion, a panty brief.

Q. I take it in your consideration of the patent that you read the descriptive portion which appears at columns 1

and 2 thereof referring to the-

The Court: The first paragraph of the description says it is a brief. You agree with that, right? The Witness: Yes, sir, it is.

Q.—to the four figures of the patent labeled 1, 2, 3 and 4? A. Yes, sir, I have.

Q. Did you give consideration to that portion of the specification headed, "I claim," which contains a representation labeled 1 commencing "An elasticized brief undergarment" and so forth? A. Yes, sir, I did.

The Court: Let us have a 5-minute recess.

(39) (Recess.)

The Court: Do you have Exhibits 15 and 16?

Mr. White: Your Honor, 15 was improved by 16 so rapidly that we were unable to find any off the shelf, so to speak, so I give your Honor 16. Can you imagine it without the improved crotch piece?

The Court: I will take what you can give me.

That is fine.

What was the difference?

Mr. White: The little inner crotch piece, your Honor, the inside one that connects the bottom of the garment.

Mr. Taylor: May I say that we have sought to have the defendant produce an Olga garment which they refer to as the basic garment, but we have never been able to get one, so I had one of the Vanity Fair people construct a garment which your Honor was about to see, 15 that you were referring to, and which, of course, has been approved by Mrs. Erteszek as an embodiment of the figures 1 to 4.

The Court: I just want to know what the differ-

ence is.

I will be glad to use this duplicate of 16. What is the difference between this and 15?

Mr. White: What your Honor is holding in his right hand was added on. It is the underneath piece that extends (40) from the bottom of the torsoing encircling part to the middle of the crotch, that inside underneath.

The Court: How is 15 attached?

Mr. White: It had none. That was the thing that the 300 had and added to the 301 patent.

The Court: In other words, on 301 there was no attachment between the body encircling piece and this front piece, right?

Mr. White: That's correct.

The Court: All right, I have that.

Mr. White: So if your Honor can just sort of imagine, you will get the point by just looking at it.

Mr. Taylor: Of course, 15 is precisely the arrangement of the 301 as Mrs. Erteszek has admitted in the course of her deposition.

The Court: Fine.

Mr. Taylor: I might say that purported samples of this garment and also a sample of Rosenthal was exhibited to the examiner in the Patent Office in the last successful inducement to allow the patent, but we have—

The Court: We are getting a little far afield. I just wanted to have something so I could understand this man's testimony. Why don't you go ahead with this man's testimony?

(41) Mr. Taylor: All right.

Mr. White: Might I make a request that Mrs. Erteszek sit by? She is a defendant's witness.

The Court: She is welcome to sit where she wants to.

Mr. Taylor: Now will you read my last question to Mr. Lands.

(Record read.)

By Mr. Taylor:

Q. I exhibit to you now a garment which is here marked Plaintiff's Exhibit 15 which I will ask you to state whether

or not it is made in accordance with figures 1 to 4 of the Erteszek patent?

Mr. White: It is stipulated.

The Court: That has been agreed. It is stipulated, is it not?

Mr. Taylor: No, unless you want to stipulate to it now.

Mr. White: I stipulate.

The Court: It is stipulated.

Let the record show that Exhibit 15 has been placed upon a dummy.

Q. Mr. Lands, will you look at the column 2, lines 42 to the line 62 of that page, and in that connection (42) refer to Plaintiff's Exhibit 15 pointing out, if you will, the several elements which are included in claim 1 following the introductory phrases, "An elasticized brief undergarment comprising"? Will you point to the garment on the form as you do so. A. Yes, sir. I am going to have to put it in my language rather than in legal language.

As I understand it, the original claim was or is that they had a body encircling piece of elastic that had an overlaid panel—

Q. Could I stop you there to have you point out the encircling body to which you have referred and I will ask you to state what that is referred to in the garment industry?

Mr. White: Objection for a moment.

I am lost. I want to go back to where you called his attention to this claim, Mr. Taylor.

Has the witness now abandoned all reference to the claim in his testimony?

Mr. Taylor: Oh, no, no.

Mr. White, I would much appreciate it if you would let me proceed with my examination.

Mr. White: I beg your pardon, Mr. Taylor.
Mr. Taylor: Now would you read the question,

(43) please.

If we are going to have continued interruption, it is very difficult to make time. I will do my best.
Will you read the last question, please.

(Record read.)

A. The encircling body has three parts. It has a left and right panel, it goes across each hip encompassing the

derriere portion-

Q. Will you point that out? A. It comes from the edge of the elastic where it is stitched here, around over the hip to the center back on the left and right quadrants on the body as such.

It has a third center panel that is laid in to connect the two which literally then becomes a straight girdle as it is

normally known in the trade.

In addition to that they have overlaid a piece of elastic in a vertical position that, for all practical purposes, covers the front panel being stitched down on the sides almost to the bottom of the encircling elastic portion and then attaching to a crotch piece at that point that goes through the crotch area, comes up into the back and is attached in the back portion which consists of, as I understand it, five basic components, three of which comprise (44) a basic girdle, one an overlaid panel and an attached crotch shield.

Q. Now let us go to the language of claim 1 in the light of your explanation just given and, again, point out the items which are defined in the language of that claim.

First I will ask you to point to the—I believe you have already covered the torso encircling body of elastic fabric. That is the girdle portion? A. Yes, the two hip panel, the back panel and the center panel.

The Court: Let me make some notes here.

Q. A wide upper panel of elastic material overlying a substantial portion of the front of said body. A. That is the vertical elastic panel inserted in the front of the garment overlaying a portion of the basic encircling part of the elastic body and stitched down almost to the bottom on both sides, but not quite.

Q. Does that wide upper panel have elastic material have side edges sewn to the body? And there will you tell me what is meant by the word "body" in that connection. A. As I understand it, it does—the panel is stitched to the body of the garment, the body being the encircling elastic that is laid in on the horizontal plane.

Q. That is the girdle portion? (45) A. That is the girdle portion, yes, sir.

Q. And having side edges sewn to the body along extends running from the body waist downwardly to locations spaced above the front bottom edge of the body. A. Well, that is the elastic stitching, triple stitching that goes on either side of the overlaid panel.

Q. And that is stitched down to a point— A. It is stitched down to a point almost at the bottom or near the bottom of the encircling girdle.

Q. The claim continues:

Said panel having lower side edge continuations of said upper edges which extend freely of attachment of the body below said location.

Will you point that out? A. That is the portion that comes down below where the overlaid vertical panel has been stitched to the encircling body member and that is the portion that comes down to the crotch area to approximately two and a half, three inches on this form. It is here and here.

Q. And then you have just described the portion which is free of the sewn side? A. Yes, it is free of the basic girdle portion, yes, sir.

Q. Then the next recital is, "And a crotch portion (46) connected at one end to the bottom of the panel and at the other end to the bottom part of the rear of said body." A. That is the crotch portion that is stitched and at the bottom of the overlaid panel that really comes at essentially at the bottom of the encircling girdle, goes through the crotch area, up in the back and is attached in the back in an approximate V or moon shape.

Q. Then there is a further description in the panel with the words, "The panel being progressively narrowed downwardly between said lower edges to meet said crotch portion of the garment." A. Well, that is where it has been —from the edge where it has been sewn down to the encircling body girdle it is narrowed down to a point at the upper edge of the crotch area so that it then can be

attached to a crotch shield or a crotch piece.

Q. The language of the claim continues.

"The lower free edges of the panel and the crotch portion together with the bottom edge of the body defining leg openings, the edges of which are adapted to elastically fit the wearer." A. Well, what they are saying is the encircling girdle member is interposed at this point with the overlaid front panel, thus, creating a leg definition that extends (47) down into the crotch area. It comes up to this point and then the overlay panel then becomes part of the crotch shield. That is the definition as you recited it, sir.

Q. And that is said to elastically fit the wearer, in other words, elastically fit the legs? A. I am sure that was the intent, otherwise there would be very little reason in being unless it was elastically fitted.

Q. Will you comment and explain the last phrases and

I quote of claim 1 of 301:

"Said panel in the worn condition of the garment elastically imposing abdominal flattening force upon the

underlying body of the garment." A. Well, what they are saying is that the front panel that is overlaying the straight girdle or the girdle encircling portion of this garment, when it is attached in the crotch, has a downward pull.

Obviously it does because it is attached at the front and back of the girdle member, so it would lock into posi-

tion the front panel, yes, sir.

Q. From your experience in the manufacture of briefs by Vanity Fair, would you see if any one of the elements to which we have referred as recited in claim 1 are new in respect of being different from the prior art as you (48) understand it? A. Well, they are not new in my opinion. They are new to a degree in that it might be stitched slightly different from that which preceded it, but basically it is a girdle with a panel that runs down the front into the back forming a brief concept.

The Court: Do I understand that the action is limited to claims 1 and 2 of 301?

Mr. Taylor: That's correct. Claim 2 if your Honor please, really recites elements B and C of claim 1 in different language as you will observe yourself. That is called a dependent claim, because it first recites all the elements of claim 1 and then it says in modification as follows.

If you look at my brief if you have it before you you wil find that whole topic laid out in analyzed form at pages 9 and 10.

The Court: Let me just read this for a moment. (Pause.)

The Court: Claim 2 really is a little different kind of description, isn't it, of claim 1? It is describing the same physical design?

Mr. White: Yes, no doubt.

The Court: So we are really concerned with the (49) description in claim 1 and, of course, the physical design.

Mr. White: That's correct.

The Court: We are going to be concerned with claim 1 of the 300 patent?

Mr. Taylor: Yes. I haven't come to that, sir. The Court: All right, go ahead, Mr. Taylor.

Q. In the course of your consideration of the prior patents, Mr. Lands, did you have occasion to observe and consider the descriptions and the specification of U.S. patent number 2,663,871, which is here as Plaintiff's Exhibit 8, patent granted to O. Erteszek for foundation garment? A. Yes, sir, I did.

Q. And will you tell me what element of the subject matter of the claim of Plaintiff's Exhibit 1, U.S. patent number 301, that Erteszek patent relates to? A. Well, as I understand it, they are talking about in this particular case a

torso encircling elastic-

The Court: When you are talking about this particular case, you are referring to 301?

The Witness: I am referring to 301. He brought

the other patent as-

The Court: The reporter isn't going to record you pointing to this, you see.

(50) The Witness: I'm sorry.

The Court: So define it.

The Witness: Plaintiff's Exhibit 8, referring to it in relation to whatever this exhibit number is—is it 15?

The Court: 15.

The Witness: The language in Exhibit 8 is very similar to the language in Exhibit 15 in that they are

talking about an elasticized encircling body of elastic with reinforced front panel.

- Q. And that is illustrated in which figure? A. That is in figure 1, figure 2.
 - Q. No, no. A. I beg your pardon.
- Q. I think you have the figures wrong. A. I beg your pardon.

Mr. White: I think it would be helpful, too, where he purports to quote or paraphrases this earlier one it would be helpful if he would talk about a particular line and column just so that I can follow.

A. We are referring to, if I can see this-

The Court: You have before you the 871 patent, Exhibit 8, and you have the 301 patent, which is Exhibit 1, right?

(51) The Witness: Yes, sir.

The Court: Are you drawing comparisons between those two patented descriptions?

The Witness: Yes, sir, in part.

The Court: All right. Can you tell me exactly what you are comparing?

The Witness: Well, the body encircling member.

- Q. Or girdle? A. Or girdle of Exhibit 15 is essentially the same as the body encircling garment in Exhibit 8, figure 5, plus having a reinforced front panel in both instances.
- Q. Which the patent says in 301 is to produce what? A. Abdomen or stomach control. They referred to it in both ways. I don't know exactly where. To tighten it, to restrict it, to control the abdominal area.
- Q. In the course of your considerations in respect of the girdle portion of the garment Plaintiff's Exhibit 15, did

you give consideration to U.S. patent number 2,872,927 to O. Erteszek for girdle structure? A. Well, that, yes, sir, I did. The patent that you just referred to uses—

Q. Let me get the plaintiff's exhibit number on that.

That is Plaintiff's Exhibit number 9. A. Plaintiff's Exhibit 9 uses a language very similar (52) to Plaintiff's Exhibit 1 where it describes the encircling elastic body of the garment with a reinforced front panel. The only difference, actually, between 9 and 1, in my opinion, is the connection of the crotch.

The Court: Just a moment.

You are saying that Exhibit 9 also has a body encircling piece and a reinforcing front panel?

The Witness: Yes, sir.

The Court: So all three of these Olga patents we are talking about have the body encircling piece plus a reinforcing front panel, right?

The Witness: Yes, sir.

The Court: In Exhibit 8 there is no crotch piece, right?

The Witness: There is in figure 5, your Honor, if you look in the upper right-hand corner. This happens to be or apparently is a multiple patent where it encompasses a straight girdle or an open bottom girdle and a closed bottom panty girdle.

Mr. Taylor: I think if your Honor will read from column 3 in patent 871, Plaintiff's Exhibit 8, where it states at line 28, "Figure 5 illustrates a variational form of the invention similar in all respects to the previously described girdle, but particularly adapted to (53) a so-called panty type girdle."

Mr. White: Would you please continue the quote? Mr. Taylor: "Here the garment has leg portions, extended a short distance below the crotch at 26 and adapted to fit snugly about the wearer's legs."

The Court: All right. Exhibit 9, this patent 927, has no crotch piece, right?

The Witness: No, sir. It is a body encircling elastic with reinforced front panel.

Q. In your consideration of the subject matter of claim 1 which you have been discussing, did you consider U.S. patent number 2,125,482, which is here as Plaintiff's Exhibit 6? Did you consider Barnes patent 2,125,482? A. Yes, I did.

Q. Will you refer to the Barnes patent 482, Plaintiff Exhibit 6, and point to the disclosure that you have in mind. A. Well, they refer to, one, elasticized body encircling members, but with a vertical stretch inset panel running down the front, narrowing down through the crotch and attaching in the back.

Q. That is, in principle, the same? A. In essence it is. There is a slight differential in that the front panel is a two-way stretch or a power net (54) type where in the Barnes it is a satin—

The Court: And it is inset?

The Witness: It is being inset in the front.

Mr. White: May I ask counsel not to lead quite so much.

The Court: If you have a specific objection, why don't you make it? I was not conscious that it was leading.

In Exhibit 6 the one-way stretch goes which way? The Witness: It goes vertical, your Honor.

The Court: It stretches vertically, but not horizontally?

The Witness: It is a one-way stretch. Thus, it creates more control over the abdominal area of the body, which you would do by inserting rigid fabrics or multiple layered fabrics.

The Court: It is an inserted panel, not an additional panel?

The Witness: No, sir, this is inserted. sir. The Court: All right. Go ahead, Mr. Taylor.

Q. In the course of your considerations, did you observe the patent number DES number 174,054 of Peck assigned to Gossard Company, which is here as Plaintiff's Exhibit 7? If so, will you describe the arrangements therein illustrated? A. Basically, they refer to a design patent of easing (55) the elastic around the leg, however, the basic concept of this garment is a wrap around elastic body encircling torso with a rigid front panel set in. This has no stretch in this particular case, the inset front patent.

They refer to in this patent in addition a design concept of putting elasticized tape, for want of a better word, around the leg in a continuing piece so as to ease the leg

encircling member.

Q. And that is in what relation to the expedient shown in the Plaintiff's Exhibit 15 garment? A. By overlaying your front panel over the basic encircling girdle you tend to free up or partially loosen the restriction around each individual thigh at the crotch area.

Q. And does the Gossard-Peck patent work in that simi-

lar manner? A. Yes, sir, it works very well.

The Court: Are you talking about Exhibit 15 or Exhibit 7?

The Witness: I was referring to Exhibit 7 back and how it relates to Exhibit 15, your Honor.

The Court: I don't understand. Are you trying to compare the two?

Mr. Taylor: Only in the sense that the Peck or (56) Gossard patent shows the element of the easing up of the leg opening so that there is no pressure on it.

As a matter of fact, let me refer to one of the exhibits that is now offered here, and that is the Gossard ad in corsets and brassieres for April, 1954, which is Plaintiff's Exhibit 13.

Q. Do you recall the impact of the Gossard patent Plaintiff's Exhibit 7 on the industry after it was offered to the trade?

Mr. White: Wait a minute. This is 1954 and he said he has been in this trade for some ten years or so.

The Witness: I have been with this company. I have been in this trade in excess of 24 years.

Q. Will you tell me what emphasis was laid in the offering of the Gossard garment as indicated in Plaintiff's Exhibit 13?

Mr. White: I object. It speaks for itself.

Mr. Taylor: Then can we have it stipulated that Gossard produced a panty that legs can't feel?

Mr. White: It is stipulated that the document exhibit says what it says.

You are talking about the one that says corsets and brassieres for 1954?

Mr. Taylor: That's correct.

(57) The Court: I guess I don't know where we are.

I think that you started to tell us the feature of the Gossard garment in some kind of a technical way and I think you said something to the effect that it was an effect of putting a panel in on easing up the legs.

The Witness: Not in the Gossard, your Honor. The Gossard primarily is an elasticized encircling body with a rigid set in front panel.

The key to the Gossard patent, as I understand it, is really nothing more but very importantly so the elasticized portion encircling the leg opening through the crotch up and around the leg as a continuous piece. That was their contention, that was the basis of the patent as I understand it and it was certainly the thing that they made the big national splurge on through the retail media.

The Court: As being something that would ease

the leg?

The Witness: Ease the leg, ease the thigh encircling, and in certain of the Erteszek patents they claim that was an integral part of their patents.

(58) The Court: How was that different from some other? For instance, in this 1938 patent, the 2,125,482 there is a continuous piece around the leg.

The Witness: Yes, sir. There has always been continuous around each leg. This particular one had a little leg in it.

What we are saying, in essence, is that prior to the patents that Olga refers to in this particular case there was on the market garments that had eased in legs in a brief form and that is what I believe—

The Court: You will have to bear with me.

The Witness: Not restrictive, non-cutting, non-binding.

The Court: And that was in contrast to what, non-elastic legs where they just—

The Witness: No, they have had elastic in the past.

Gossard got their design patent based on that and that alone as I understand the patent and it was because they for the first time had an elastic edging that freed up the legs more than garments previously had done.

The Court: What had the garments previously done with regard to the legs?

The Witness: They usually used an elastic piece (59) attached underneath the power net and it was usually not as free or as easy as the Gossard garment because at that time—

The Court: Why did-

The Witness: (Continuing)—they cut it high, they cut it freer in front and so much so it did not or tended not to bunch up in the crotch.

The Court: Why the elastic?

The Witness: I think it was the form of the elastic and cut very high in the front, set on as a continuing piece so there were no ridges to interrupt and cut and bind in between the thigh or around the thigh.

The Court: In some of the others there were ridges that you feel—

The Witness: Yes, elastic of the type subject to various width as the type set up on the top here or set in around the bottom here.

The Court: What is it in the 301 patent that claims anything that would be similar to what Gossard claims?

The Witness: I would have to go back and have counsel pull it out.

There is a point—I don't know exactly where it is. We are talking about freeing up the thigh area, freeing up the encirclement of the leg. I don't know whether it is in 301 or 300, frankly, at this stage of the game.

(60) The Court: I would just like to know or get the point we are driving at.

I understand that one of the points you are driving at is that one of the elements in the Olga patent

is related to freeing up the legs and making the legs more comfortable.

Mr. Taylor: That is one of the elements.

The Court: You are going to say that that was anticipated by the Gossard patent to some extent.

I would just as soon be told right now what the comparison is.

Mr. Taylor: The Gossard patent frees the legs, as

the ad states, by cutting it high.

You see, if you look at the patent disclosure, you will see that the leg openings, they are really not legs, they are leg openings, you might say, are cut high but they are elasticized and the idea is by cutting them high you produce a comfortable garment and yet retaining the elasticized leg opening, which is the critical item.

The Court: Let us take 301 or 300 and see if they claim that as being a novel element.

Mr. Taylor: I am sure it is in 301 in language that is dependent upon the manner of sewing.

You see, here they depend upon the way in which the panel is set in over the girdle in relation to the lower edge (61) of the girdle portion and the side of the crotch portion provide a leg opening which does not bind or otherwise impair the comfort of a person, for example, when they sit down.

The Court: Is there anything in 301 in the description that talks about the comfort of the leg?

Mr. White: Yes, sir.

Mr. Taylor: I don't know just in that language, but I can point it out to you.

Mr. White: It is a major part of the whole idea.

Mr. Taylor: At a front panel reinforcement productive of abdominal flattening and also to form edge portion of the leg openings 27 all in a manner

such that the garment is properly and comfortably conformed to the legs of the wearer.

That occurs at column 2 beginning with line 28, I think.

The Court: Also column 1, line 37, "Bind of the relative freedom of the crotch and panel sections, the garment fits about the legs without the degree of tensioning normally encountered in elasticized leg opening briefs, thus, assuring comfort to the wearer without excessive tightening about the legs.

Where is the point you pointed out to me in column 2? I haven't seen that.

Mr. Taylor: If you will look at column 2, line 28, (62) "and also to form the forward edge portion"—
The Court: Just a moment. Let me read.

"Thus, while the latter serves the girdle in characteristic functions, the panel and crotch pieces are free to serve in conjunction with the body as a front panel reinforcement productive of an abdominal flattening effect and also to form the forward edge portion of the leg openings all in a manner such that the garment is properly and comfortably conformed to the legs of the wearer, but without that degree of elastic confinement which would produce indentation and bulging in the leg openings with defined by continuously endless tensioned elastic."

In the Gossard don't you have continuously endless elastic?

Mr. Taylor: Yes, but it is arranged so that the pressure is not like in the usual arrangement which had leg portions which did impose upon the leg an excessive effect of the elasticizing of the opening.

The Court: I don't want to get into the interfere with your examination, but the problem I have—I might as well tell you what my problem is.

Sure, there are general similarities and this witness has stated them in very general terms. All of these garments presumably are in the midriff, they are supposed to (63) do something for the abdomen, they are supposed to be comfortable for the legs and so forth, but the question is how. I take it each one is trying to do these things in a different way and it seems to me that the way that Exhibit 15 handles the leg problem is defined differently and is different from the way the leg problem is handled in 7. isn't it?

Mr. Taylor: Yes.

The Court: Just to say they both try to handle or make the legs more comfortable, what does that do?

Mr. Taylor: Your Honor, we are trying to analyze this claim element by element.

I will come to a patent very shortly which combines all of the thoughts and elements and developments of the prior article into one prior patent and we are going to reach that at this moment.

The Court: But I will tell you, if you are not going to be more specific about likenesses or differences then just saying that, yes, this prior patent had a piece in the center, something like that, I don't get very much out of it.

Mr. Taylor: Because this, for example, to use your own language, the structure of 301 has a panel in the center and panels to produce abdominal flattening or abdominal control have existed from the very beginning of the article, so one of the elements which Olga embodied in 301 was the front (64) panel which, as she says, impose a flattening effect upon the abdomen of the wearer.

If I go through the prior article and show you that all of these thoughts separately are old, then if I

show you a patent which combines all of them into one, then you have the complete answer to the Olga patent 301.

The Court: I would think that there would be—
The problem I am going to have, and I am sure
Mr. White is going to raise it on cross and I probably should not meddle with it anymore, but the
problem I have is I would assume—it is just like
telling me that a bridge goes across a river and all
bridges having to cross rivers back till the present
history, I suppose. But the problem is everybody
solves bridge problems differently.

For you to say that people have thought for a long time of having garments around the midriff and having leg openings and so forth, yes, I think that is obvious without anybody even testifying about it. But I would assume that the engineering problems, so to speak, are such that everybody handles it a little differently and maybe those differences are very important in comfort, in handling of the abdomen.

So it is the way that it is dealt with.

If you don't face the fact that these different patents handle these problems differently, you are not helping (65) me very much.

Mr. Taylor: You see, your Honor is-

The Court: I probably am not putting it very well, but that is my problem.

Mr. Taylor: I understand. What I am and which, of course, is required under the interpretation of the statute 103 which has to do with obvious over the prior article, you must of necessity establish that each one of these fundamental elements are old so that when you combine them in the form in which they are expressed in claim 1, why, then, you have to see whether or not—

The Court: What is there in the statute that talks about fundamental elements?

Mr. Taylor: You can read 103.

If you will look at page 26, 103 provides as follows:

"A patent may not be obtained though the invention is not identically disclosed or described as set forth in Section 102 of this title if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains."

The Court: Nothing about the fundamental elements. (66) The whole point is, it seems to me, is the manner in which the problems have been handled in the Olga patents differ, novel and nonobvious?

Mr. Taylor: That's right.

The Court: It is a crude analogy, a bridge. Everybody knows that a bridge has to get across a body of water, but the question is how do you do it.

Everybody knows here that one of these garments has to achieve certain results, but there may be very big differences in success between doing it one way and doing it another and it may be that that difference is by a little different angle or a little different type of sewing, and unless you are going to get me into the details of these differences I don't thinkyou know, I am not particularly benefited.

Mr. Taylor: You see, I am now about to call attention to a patent which combines all of these fundamental things into the aggregation which is defined by claim 1 of the Olga patent 301, Plaintiff's

Exhibit 1.

The Court: Mr. Lands, as far as the leg problem we would concentrate on, the leg problem is handled differently in Exhibit 15 from the way that it is in 7, is it not?

The Witness: Fractionally different, yes.

The Court: Just in what ways is it different?

The Witness: Well, you have an overlaying panel (67) here, sir, that creates part of the actual leg encirclement whereas in Exhibit—

The Court: You are talking about Exhibit 15?

The Witness: Yes, 15 has it.

The Court: How is that done in 7?

The Witness: In 7 it is done with an inset crotch but it is the freedom of the leg encircling portion I think Mr. Taylor had reference to here.

Mr. White: It is explained in Exhibit 13.

The Witness: It frees up-

Mr. White: Exhibit 13 tells you in so many words how it is done, your Honor.

The Court: Where in Exhibit 13?

Mr. White: You see to the left under the big word "how" it is the last page we have been talking about of this exhibit.

The Court: I have Exhibit 13. I see it.

Mr. White: If your Honor will read the text at the left of that lady, I think it tells you exactly how that works.

The Court: What is it that tells me?

Mr. White: It says, "this is the panty that legs can't feel, that controls the figure so that you will sell like hot cakes, even to confirmed anti panty folks."

(68) The Court: I want to know how.

Mr. White: It says, "Lazy elastic finishes the legs lightly."

Does your Honor see that?

The Court: Yes.

Mr. White: That is what I am talking about.

What they have done, in looking over to the right at the picture, they have a wide tape of lazy elastic that takes the pressure from a line pressure to a zone pressure.

Does your Honor see the point?

If you take a force and spread it over a discreet width of an inch, it does not feel as bad as if you took a string and wrapped it around there and put the same tension on it.

Mr. Taylor: But, of course, that is not the basis of the Gossard arrangement. The idea of cutting it high and not having the continuity of the leg around the legs as it was in the past—

Mr. White: Why do you say that?

Mr. Taylor: All you have to do is look at the picture.

The Court: How is the leg problem taken care of here?

Q. Will you explain that? (69) A. Well, the leg is two part here. It encompasses a portion of the body encircling elastic, which is the straight girdle portion from this point out, and then your overlaying panel, which becomes part of the crotch, is the continuation of the leg opening, the leg encirclement.

The Court: So the leg opening is formed not by a continuous circle around each leg, but it is formed by two pieces that form parts of the leg openings, one is the crotch piece and one is the body piece, right?

The Witness: Yes, sir, but they are connected as integral parts.

When you see them together at this point they become a continuation.

If you will follow the finger running of the elastic down through the crotch into the back and up through this portion, that is thigh encircling as I would understand it.

Mr. White: I think the patent makes the very point your Honor, that the independent flexture of those two points and the interruption of the continuity of the leg opening is the secret.

The Court: Where is that?

Mr. White: It says here, "The stated relationship between the—"

The Court: Where are you reading?

(70) Mr. White: I am trying to find it. I don't know this as well as I should.

Line 20, column 1, it says, "And a front panel and crotch portion so associated there with as to form," and now I want to underline, "with independent capacities for movement as later described, an overlaying front reinforcement and means in conjunction with the body, providing the leg openings."

The Court: We went over some of this language before. Behind of the relative freedom of the crotch and panel sections, the garment fits about the legs without the degree of tensioning normally encountered in elasticized leg opening briefs, thus assuring comfort to the wearer without excessive tightening about the legs.

Mr. White: There you have it.

The Court: Then over on column 2-

Mr. White: We read that at line 27. There is a whole bit on it there, too.

The Court: Whether this is successful or not I have no idea, but it seems to me, Mr. Lands, that it

is a different approach from the Gossard thing. Am I wrong?

The Witness: In my opinion, it is a very limited differential, because the Gossard device, if you will witness how it does, it starts at one point, encircles the thigh up (71) through the crotch area and reattaches itself.

The only difference here is it does not reattach, but it does start at one point with an elastic piece going through the crotch area, coming out in the back area, continuing to encircle the thigh, coming up in front and locating again, at the same point so it is thigh encircling exactly the same basic thing as the Gossard.

The only difference is Gossard is attached here and this one is not attached.

The Court: That is the whole point of the Olga patent is trying to make.

I mean, whether this is of real benefit to a woman I have no idea, but at least the Olga patent claims that by not having the crotch piece attached where it meets the body piece at the leg that that gives an independence of movement. That is different, isn't it?

The Witness: It is not attached, your Honor, you are correct.

The Court: In Gossard it is attached all the way around the leg, it is attached at the leg, at the juncture of the two pieces.

The Witness: Yes, sir, it is.

The Court: These are the differences that are going to emerge. They are there.

(72) The Witness: Gossard achieved it essentially the same way with a lighter elastic. The elastic encircling the leg was lighter, it had less elasticity or the kick and that is the reason why you have that.

Mr. White: Before leaving, can I direct the Court's attention to the first patent, the 300 patent, which speaks on this in one added sentence which I think ought to be noted.

The Court: In the 300 maybe you are closer to the Gossard, because you have the piece attached.

Mr. White: It is a question of the difference. It is slacker relative to the outside, so although it serves a function it does not do the same.

The part in the patent, your Honor, that I will just read in the patent itself.

The Court: Where are you reading from.

Mr. White: Column 1, line 31. That is the improvement patent, your Honor.

Essentially it says the same, but I found an added statement in here at line 31, column 1:

"All in a manner such that the panel overlays the body and has freedom for movement or stretching relative thereto, except where the two are sewn together, so that the bottom extent of the panel and crotch section have freedom for wear (73) conformance independently of the body."

That is the point I am trying to make. The Court: I don't understand that.

After giving all this thought to Exhibit 15, we come to 16, which is different.

Mr. White: Yes, that's correct.

The Court: I am going to turn the floor back to you, Mr. Taylor, but I want to know at some point—I gather that the treatment of the legs is quite important for comfort and if you are going to claim that the treatment of the legs was already substantially handled in the prior art, then I have got to have fairly minute comparisons in the differences.

Mr. Taylor: We are coming to that point now and

all I was trying to show was the several elements of

claim 1 per se were old.

Now we come to consider as the patent law recites the combination of those elements, why, then you must have a reference which includes all of the critical elements or substantially so, so that a contention of invalidity may be made under 103.

I will refer now to the Rosenthal patent, Plaintiff's

Exhibit 5, number 2,763,008.

Q. Mr. Lands, in your consideration of the Olga patent 301, did you give consideration to Rosenthal patent number (74) 2,763,008 here as Plaintiff's Exhibit 5, which I now exhibit to you? A. I did, sir.

Q. Can we have a moment out to put the Rosenthal garment on the other form so that you may look at the two

together.

Mr. White: That has been objected to. Why don't we lay a foundation now?

Mr. Taylor: I don't see how any objection can be made to it except of the Rosenthal patent because it is a part of the proceedings in which—

The Court: The Rosenthal garment. Maybe you can testify it was made in accordance with the draw-

ing.

Mr. Taylor: It was made by the same young lady who made the 301 garment which we were unsuccessful in getting a sample of from the defendant and I would assume that the same care was given to the inclusion of the several elements of the various arrangements shown in the Rosenthal patent.

The Court: Ask your witness about that and lay

your foundation.

Mr. Taylor: Do you want me to interpose at this point and have Mrs. Reardon take the stand?

Mr. White: Yes, and I would like her on the voir dire.

(75) The Court: Why don't you step down, Mr. Lands, and we will lay a foundation for the Rosenthal garment.

(Witness temporarily excused.)

Mr. White: The reason is, I am sure your Honor will appreciate—

The Court: That is all right.

FLORENCE REARDON, called as a witness on behalf of the plaintiff, having been first duly sworn by the Clerk of the Court, testified as follows:

Direct Examination by Mr. Taylor:

Q. Will you state your full name and address, please, Mrs. Reardon? A. Florence Reardon, 83 Seaman Avenue, Rockville Center, New York.

Q. Your unmarried name was what? A. Cybuch.

Q. What is your present employment, if any? A. Home maker.

Q. And were you ever employed by Vanity Fair Mills, Inc.? A. Yes.

Q. Could you tell me the date of first employment and when you left? (76) A. July 1963 to June 1970.

Q. And what was the nature of your duties at Vanity Fair Mills from the period you have stated? A. I was a foundation designer.

Q. And what garments, just briefly defined, did you take part in designing? A. Specific or just general?

Q. No, just generally? A. Bras, girdles, panty girdles, briefs, you know.

Florence Reardon—For Plaintiff—Direct.

Q. At one point in the course of the pendency of this action, you gave testimony, did you not, during a pre-trial examination in this case? A. Yes.

Q. And you were examined by Mr. White or Mr. Coch?

A. Mr. Coch, I think.

- Q. You heard the testimony this morning wherein I referred to the garment which is here as Plaintiff's Exhibit 15 as successfully embodying the arrangements of figures 1, 2, 3 and 4 of patent 301 to Erteszek? A. Yes.
- Q. Will you tell me whether or not you made up this garment at my request? A. Yes, I did.
- Q. And how did you go about designing it or making it? (77) To what did you refer?

Mr. White: Your Honor, Mr. Taylor must not have understood. I have no objection to Exhibit 15. The Court: I think it is part of the foundation. Let him go ahead.

A. I had a basic brief pattern which, by means of pattern making, I was able to make this pattern just by following this diagram, which is very explicit.

Q. When you refer to this diagram, you are referring

to what? A. The 301 patent.

Q. Which is Plaintiff's Exhibit 1? A. Right.

Q. And to your knowledge, your making of that has never been challenged, has it, in the course of this proceeding? A. No.

Q. How will you observe a garment which is here identified as Plaintiff's Exhibit 17, and tell me whether or not

you made that garment? A. Yes, I did.

Q. And at my request? A. Yes. Q. What did you follow in the course of your making of the garment? (78) A. I followed the patent, the Rosenthal patent.

Q. That is here as Plaintiff's Exhibit 5? A. Five, yes.

Q. And to the best of your belief, you accurately followed the arrangements illustrated in the figures of the Rosenthal patent, Plaintiff's Exhibit 5. A. Enough to show the principle of the thing.

Q. So far as you are concerned, this accurately repre-

sents the Rosenthal garment, does it not? A. Yes.

Q. Did you ever see an ad that published the Rosenthal garment in any one of the trade publications? A. I did

from you.

Q. I show you a document which is here as Plaintiff's Exhibit 14, an advertisement of Maidenform which appeared in the Corsets and Brassieres Magazine for April 1955, and I will ask you to state whether or not the diagram on the page inside the cover sheet, so far as you are concerned, confirms the structure which you made in the garment Plaintiff's Exhibit 17 which you used the Rosenthal patent? A. Yes, I would say so.

The Court: Anything else? Mr. Taylor: No, I think not.

I may want to recall Mrs. Reardon.

(79) The Court: That is all right. I think Mr. White has some voir dire.

Voir Dire Examination by Mr. White:

Q. Mrs. Reardon, Exhibit 15 is a much more accurate copy of the diagram of Exhibit 1 than Exhibit 17 is a copy of Exhibit 5? You would agree with that, wouldn't you? A. Yes.

Q. Let us examine some of the respects in which Exhibit 17 for identification is not similar to the diagram of Exhibit 5.

In the first place, the Rosenthal patent tells us that it is best not to have the fabric of the body or the girdle part, I

think it calls it, designated 3, as stretchable in two directions, isn't that true? A. Yes.

Q. Why didn't you pick some material for this copy that only stretches in one dimension and not the other? Did Mr. Taylor ask you to do that? A. Can you repeat that?

- Q. Why is Exhibit 17 made of two-way stretch instead of one-way stretch? Did Mr. Taylor ask you to do that? A. We didn't have any. There is very little one-way stretch around.
 - (80) The Court: The Rosenthal patent itself calls for one-way stretch?

Mr. White: It prefers it, yes, your Honor.

The Court: Where does it do that?

A. I don't think that is one-way stretch.

The Court: Just a moment. You are going to point out what you are talking about.

Mr. White: Yes, your Honor.

At column 1, line 29.

The Court: The girdle is constructed primarily or as a whole of elastic material which will have a stretch in the lateral direction of the garment, but which preferably has little or no vertical stretch.

The Witness: Little or no, so-

Q. That's correct. A. Little.

Q. Does that fairly accurately describe Exhibit 17, what his Honor just read? A. You are saying it shouldn't have been made out of a two-way stretch.

The Court: He is just asking you what you put into Exhibit 17.

Is it two-way stretch material?

The Witness: Yes.

(81) Q. The other thing is the panel which you put into Exhibit 17, the underneath panel—if the Court pleases, it is underneath in Rosenthal instead of outside—in that case, that fabric is not rigid, is it, in 17? A. I don't know.

Which way?

It is rigid vertically.

Q. Do you know? A. It is rigid vertically, yes.

Q. It has no elasticity in the up and down direction? A. No, in that portion and in that portion only.

Q. Yes. A. This insertion is elastic, from here to here?

Q. That is as described in the patent? A. Yes.

Q. There is an insert between the bottom of this insert and here which is stretchable? A. Yes.

The Court: I don't understand the problem. Does the patent say that the panel is supposed to have two-way stretch or no stretch?

Mr. White: No, no.

I think I am right, your Honor, in saying that the patent is utterly silent on what that should be made out of.

(82) Q. You will agree with me, Mrs. Reardon, will you not, that you have made the girdle part of Exhibit 17 for identification here on the outside of the hips and it is shown in the figures of Exhibit 5? It comes down lower? The legs are not cut so high on the outside? A. Well, I will just pull it down. We didn't fool around fitting this garment.

Q. In other words, isn't it true as shown in the Rosenthal patent, Exhibit 5, these legs begin here and they go high on the outside relative to the example of Exhibit 17.

A. Yes, you could say that.

Q. Conversely, is it not also true that in the Rosenthal patent Exhibit 5, there is what you would call an apron portion that hangs down in the front that I don't really see

at all in Exhibit 17 for identification, would you agree with that? A. Yes, it should be straight across. It is straight across, right.

Q. So you really omitted this little apron affair from

your mock up? A. A definition of these points.

The Court: The apron, Mrs. Reardon, how would that have affected it?

The Witness: It wouldn't. It would just have made (83) it longer.

The Court: What area?

The Witness: Between here and here (indicating).

The Court: In other words, the front of the crotch would come down a little bit lower?

The Witness: Lower.

Q. You say that that wouldn't effect it, but it would do something quite interesting to the wearer, wouldn't it? I mean, wouldn't that give the wearer a certain feeling of more confidence than to have left it off as you did? Isn't that called sort of a modesty apron of some kind to sort of conceal or cover up the wearer's crotch portion? A. But tricot is doing it. The tricot portion is doing it.

The Court: She has explained the difference, I think.

Mr. White: For the Court's edification, the defendant regards as most significant the distinction in regard to the relationship between the outside height of the leg openings and the point at which the panel terminates, the sewing on the inside panel terminates.

If your Honor simply strikes a horizontal line from the outside openings of the leg holes in the patent Exhibit 5, it will cross just about exactly at

the point at which the (84) sewing of the panel ends and, therefore, as far as the garment as shown in Exhibit 5 is concerned, that portion of it which functions as a torso encircling girdle does not extend below the point at which the inside panel is sewed.

I object to the acceptance of the exhibit as an attempt to establish prior art nunc pro tunc without adequate basis in any authentic prior art document.

Mr. Taylor: And in reply, if your Honor please, I say that I have made frequent demand upon the defendant to produce the garment which they exhibited to the examiner and which resulted in the allowance of this patent by demonstration, and I have never received any assurance that they would give me a copy of it or the original garment that was submitted to the examiner in the Patent Office, so that we have no way of knowing, other than the patent itself and the ad which your Honor has observed, as to the construction of the Rosenthal patent.

But I believe in view of the fact that Mrs. Reardon is an extremely qualified designer and constructor of garments that insofar as her effort is concerned that it is as complete a copy of the Rosenthal patent and its ad that could be made and I respectfully ask that either the defendant withdraw its objection to this garment or to produce a garment which was the one exhibited to the examiner and which resulted in the (85) allowance of the Olga Erteszek patent.

The Court: It seems to me they are two completely different issues. One is to give this Court a useful representation of the Rosenthal garment and the question is whether this does it sufficiently to be useful to me.

Secondly is what the defendant did before the Patent Office.

We will take them one step at a time.

I think I will receive the exhibit. It is of some use, although—it seems to me, Mrs. Reardon, even from a look at the patent Exhibit 5 it does not follow it very well. It has some of the basic elements. The supporting panel is inside, but the fine points, the shape around the hips, is quite different, so it is really of somewhat limited use.

What do you want to say?

The Witness: This is just what I was going to say.

This is pictured, let us say, in the hand and when something goes on the body different things happen to it.

I agree this should have been longer. I just made it one, two, three. I didn't take any specific care in lengthening this. I was not really trying to—you couldn't even say duplicate it. I was trying to show, let's say, the principle of the thing, the invention portion, period, forget (86) the details of length, shape, et cetera.

The Court: It will be received and it is received subject to what Mrs. Reardon has explained and the things you have brought out, Mr. White. It illustrates what it illustrates. Okay. Objection overruled. Received under those conditions.

You had an Exhibit 17A and 17B, didn't you, Mr. Taylor?

Mr. Taylor: That is 17A. The Court: Which is it? Mr. Taylor: This is 17A.

The Court: All right, Exhibit 17A received.

(Plaintiff's Exhibit 17A was received in evidence.)

Mr. Taylor: I have no further questions of Mrs. Reardon at the present time.

The Court: Are you offering Exhibit 17B?

Mr. Taylor: Yes, I have 17B. If you would like, if Mr. White is going to make any objections to 17B—

Mr. White: What is that?

Mr. Taylor: 17B is with the panel reversed on the Rosenthal arrangement.

The Court: You mean having it in front?

Mr. Taylor: That's right. That is the whole issue in the Patent Office. The patent examiner—

(87) The Court: Did Mrs. Reardon make 17B?

Mr. Taylor: I think she did.

The Court: You introduce them in whatever order you want.

Mr. Taylor: I would be perfectly glad to proceed with 17B, because—

The Court: It is up to you. You have a witness on the stand who made the garment.

Mr. Taylor: I assume he was on the voir dire, as Mr. White put it, when we had the discussion originally, but however, I will proceed because I think it would be a good idea if it was done right now.

The Court: Why don't we do it-

Mr. White: It saves time to do it all. If we have anymore for her we will go through them all.

Mr. White: I want to observe to the Court that things like this can be unduly prejudicial to a patentee, particularly on the Appellate stage.

Unfortunately, physical exhibits somehow tend to imprint themselves on the minds of judges. I have in my own mind what I consider to be a legitimate reason for pressing this objection.

The Court: I don't think this is prejudicial, Mr. White. If anything, it is so contrasting with what

the (88) Olga Patents are, I think it is prejudicial to the other side.

That is 17B, the panel outside. You made that, Mrs. Reardon?

The Witness: Yes.

Again, it was made over the same pattern.

The Court: Made with the same dimensions of 17A?

The Witness: The same identical pattern, yes, only outside.

The Court: This is not the Rosenthal design, 17B?

Mr. Taylor: No. His patent shows only 17A form.

This comes in the doctrine that the courts have announced in this circuit, that the mere reversal of panels is not an invention.

The Court: And so for the purpose of this case you had Mrs. Reardon make a Rosenthal garment or a schematic, in a sense—

Mr. Taylor: Of what she believed to be the Rosenthal patent.

The Court: You asked her to put the panel outside?

Mr. Taylor: That's correct. In other words, the panel is on the outside as it is in the Olga patent, Plaintiff's Exhibit number 1.

The Court: Any objection on the voir dire?

(89) Mr. White: None, but would it be accurate, Mrs. Reardon, just to say that 17B is essentially 17A turned inside out?

The Witness: Sure.

The Court: Any objection?

Mr. White: None.

I have, but subject to your Honor's ruling.

The Court: 17B will be received.

(Plaintiff's Exhibit number 17B was received in evidence.)

The Court: Let us adjourn for lunch until about 2:20.

Mr. Taylor: If your Honor please, before we adjourn, may I bring this to your Honor's attention that Mrs. Reardon has a very young baby and it is very difficult for her to be away from home and I am wondering whether or not we might be able to continue with her on any other topic except for the 17A and B, which I believe is now terminated, and also the aspect of the defendant's approach, because there was quite an extensive examination of Mrs. Reardon pre-trial.

I don't know what their intentions are.

The Court: Do you want to have Mrs. Reardon testify to you on any other subjects besides the making of these two garments?

(90) Mr. Taylor: I can tell that after this recess, because I would like to go through the garments and see what the score is as to whether or not there were additional garments that she made.

The Court: I think Mr. White was agreeable. Let us finish up with Mrs. Reardon on any garments you want to introduce through her.

Mr. White: Or anything else. I don't mind if he interrupts the other witness, your Honor.

The Court: Then you are free to finish with her after lunch.

Mr. Taylor: Thank you, your Honor.

(Luncheon recess.)

Florence Reardon—For Plaintiff—Direct.

(91) Afternoon Session

2:20 p.m.

FLORENCE REARDON, resumed.

Continued Direct Examination by Mr. Taylor:

Q. Mrs. Reardon, I place before you a garment, Plaintiff's Exhibit 15, which you identified this morning as following the arrangements of 1, 2, 3 and 4 figures of Erteszek Patent Number 3,142,301, Plaintiff's Exhibit 1.

I now exhibit to you a garment which was here identified as Plaintiff's Exhibit 19.

Will you tell me whether or not you constructed that garment? A. Yes.

Q. And in accordance with a request made by me that you arranged the garment with the panel on the inside as distinguished from the panel on the outside as it appears in Plaintiff's Exhibit 15? A. Yes, that's correct.

Q. And would you tell me whether or not the dimensions and what not have the arrangement shown in Plaintiff's Exhibit 19 are the same or closely similar to those of Plaintiff's Exhibit 15? A. They were made over an identical pattern, so I (92) would assume they are the same.

Q. This procedure of making one in accordance with the patent and then the reverse was what you followed in connection with the Rosenthal patent, is that correct? A. Yes, it was.

Mr. Taylor: I have no further questions of Mrs. Reardon.

The Court: Are you offering Exhibit 19?

Mr. Taylor: Yes. I think it has been received in evidence.

The Court: It was objected to.

Florence Reardon—For Plaintiff—Cross. Grover H. Lands—For Plaintiff—Direct.

Mr. Taylor: I offer in evidence Plaintiff's Exhibit 19 for identification.

The Court: Any objection, Mr. White?
Mr. White: I don't think so, your Honor.

Cross Examination by Mr. White:

The Court: Just so I understand it perfectly, 19 is just like 15, the only difference being in 19 you put the front panel on the inside of the body encircling portion rather than on the outside?

The Witness: Yes.

Mr. White: I withdraw my objection, your Honor.

The Court: All right. 19 is received.

(93) (Plaintiff's Exhibit 19 was received in evidence.)

Mr. Taylor: That is all I have with Mrs. Reardon.

The Court: All right.

Mr. Taylor: Mr. White has told me he has no further need for her.

The Court: All right.

Mr. Taylor: Is that correct?

Mr. White: Yes, I have no questions.

The Court: Mrs. Reardon, you are excused.

(Witness excused.)

Mr. Taylor: Mr. Lands, will you resume the stand, please.

GROVER H. LANDS, resumed.

Continued Direct Examination by Mr. Taylor:

Q. We were about to discuss the Rosenthal Patent, Plaintiff's Exhibit 5.

I take it that you have read the Rosenthal Patent 2.763,008, Plaintiff's Exhibit 5? A. Yes, sir, I have.

Q. And you have also examined the garment which Mrs. Reardon has made in accordance with the disclosure of Rosenthal Plaintiff's Exhibit 5? A. Yes, sir, I have.

(94) Q. Will you explain to the Court, if you will, in respect of the subject matter or definition given in claim 1 of '301 patent and point out, if you will, the several elements of Patent Number '301 as they appear in the Rosenthal Patent Plaintiff's Exhibit 5 and also in the garment Plaintiff's Exhibit 17A?

Mr. White: Objected to as leading.

The Court: Overruled.

A. Well, in the basic '301 patent they speak of having a girdle encircling elastic body with an overlay panel and such.

In the case of the Rosenthal Patent, Exhibit 5, it has essentially the same thing as far as the body encircling body—body encircling elastic girdle with the underlaying panel, which is affixed in essentially the same manner as far as stitching is concerned. It is stitched down on both sides to a point near the bottom of the basic encircling girdle.

The only basic difference, in my judgment, is that one has—the '301 patent has the panel overlaying whereas the Rosenthal patent Plaintiff's Exhibit 5 has an underlaying

panel attached to the crotch member.

Q. Would you direct your attention to the leg openings in Plaintiff's Exhibit 17A, the Rosenthal Patent arrangement of Plaintiff's Exhibit 5, and tell me whether or not they (95) are in relation the same as that shown in Erteszek Patent Number '301, Plaintiff's Exhibit 1? A. They are for all practical purposes the same, with the one exception that this is an underlying panel stitched down almost to

the bottom of the girdle member, whereas in the case of the '301 patent you have an overlaying panel that is stitched down almost to the bottom. It is the question of the degree of the width of the panel for one and the fact that the Rosenthal panel is underlaid where the Erteszek panel is overlaid, your Honor.

The Court: Read the question, please. (Record read.)

A. The opening of the leg is essentially executed the same where the elastic member of the encircling body goes around and encompasses and meets the underlaying crotch panel and then it is a question of one being overlaid, the other one being underlaid.

Q. Would you say, in your opinion, after consideration of Rosenthal Patent Number 2,763,008, Plaintiff's Exhibit 5, and looking at the garment as it appears on the form, the garment being Exhibit 17A, that for all practical purpose that garment is the arrangement shown in Rosenthal, Plaintiff's Exhibit 5? A. Well, the one basic point of difference is the (96) question of the degree and that is the amount of stitching that is taking place in the front underlaid panel in relation to the side hip development and such and the length of it.

If we had gone back and measured it—and I didn't actually have anything to do with making it—if the young lady could have gone back and checked it she could have extended the stitching in the front or cut it a fraction here. In either case you have essentially the same garment.

You can work the side panel quite a bit as you can any elastic side fabric putting it on a body as you put it on a torso. When you put it on a torso you extend it some bit.

I would certainly concede there is a fractional amount of difference between the side position and the front stitching,

although we can extend the stitching in the front which I think probably would achieve the same thing as far as making the side and the front stitched down portion approximately the same level around the body.

The Court: I thought we went through that with Mrs. Reardon?

Mr. Taylor: I know, but I wanted to have this now in terms of the claim language as distinguished from the actual construction of the garment in the form of (97) a testimony from a designer's standpoint, and now I am trying to finish up my testimony with respect to the fact that the Rosenthal patent puts together all of these broad—

The Court: I understand that. I didn't appreciate the significance.

What point are you trying to make as to the similarity between Exhibit 17A and the patent that is described and illustrated in Exhibit 5?

Mr. Taylor: Only with respect to the locus of the panel.

May I read you a commentary made by the examiner in the Patent Office because it succinctly—

The Court: No.

Mr. Taylor: It is in the certified file history which is in evidence as Plaintiff's Exhibit 2 and perhaps it would answer your Honor's question very quickly. That is the only thing.

The Court: Go ahead.

Mr. White: I must admit that I am not clear that the comparison is the thing on the form and the Rosenthal patent Exhibit 5 and the thing on the form and Exhibit 1.

The Court: No. I think he just said the comparison between Exhibit 17A and Exhibit 5.

Mr. Taylor: The file history, Plaintiff's Exhibit (98) 2, of the '301 patent, the following statement was made on behalf of—

The Court: What page is that? Mr. Taylor: That is on page 20.

It was admitted in the patent on behalf of Olga as follows:

"One of the principle differences between the applicant Olga garment and that disclosed in Rosenthal patent lies in the fact that the applicant's panel overlays or is on the outside of the torso encircling body."

Is that the file history of '301?

The Court: Yes.

Mr. Taylor: It starts off, "One of the principle differences . . ."

The Court: Let me read that.

(Pause.)

The Court: You are reading the argument-

Mr. Taylor: Made on behalf of Olga, the defendant.

Now I will refer your Honor, please, to the examiner's commentary, which you will find in the same document at page 17.

The examiner said, "The inclusion of a front panel," and I have omitted a couple of words, "overlaying the front of the body involves merely a simple expedient of choice. (99) This would be an obvious reversal of arrangements."

The Court: I am still not clear and I wouldn't belabor the point, but you asked this man to compare Exhibit 17A, the garment, and Exhibit 5, the patent, right?

Mr. Taylor: Right.

The Court: And he testified that they are essentially the same and he talked about the fact that the stitching on the panel could have been here.

On Exhibit 5, according to Exhibit 5, should the

stitching be lower?

The Witness: Mr. White posed a question earlier to Mrs. Reardon that this garment and the patent, Rosenthal patent, Exhibit 5, were not made the same and I was making the point, sir, that had the front stitching been extended or the side cut fractionally higher it would have come more in conformity exactly with the patent of the Rosenthal patent.

Mr. White: That really was not my point, your

Honor.

The Witness: I thought you were questioning the way the garment was made as compared to what the actual garment was.

Mr. White: Yes, but not in-

The Court: We don't want to have argument with (100) the witness.

Go ahead, Mr. Taylor.

Q. May I recapitulate by asking this:

Is it, in your opinion, that as far as the essential features of Rosenthal is concerned that they are illustrated in the garment Plaintiff's Exhibit 17A and that any differences are really of little consequence from the standpoint of the arrangement which is claimed—

The Court: The objection to that is sustained. That is completely leading.

Mr. Taylor: I will ask the witness to tell me if this is for all practical purpose for the comparison of claim 1 of the '301 patent, Plaintiff's Exhibit 1, the arrangement as shown in the Rosenthal Patent.

The Witness: Yes, sir, it is.

The Rosenthal Patent and this garment that is on display representing the Rosenthal Patent is essentially as I would know the Rosenthal Patent from

reading it.

If we were to compare the Rosenthal Patent with the Olga '301 patent, then I think that they are very, very similar in part with the one exception being that the Rosenthal Patent has an underlaid front panel that is stitched down essentially as it is in the Olga patent, it is slightly narrower and is laid underneath the garment. Outside of that, (101) if we were to reverse this and put the panel over the front of this rather than underneath it, we would have for all practical purpose the '301 patent as I understand it.

Q. Would you direct your attention to the garment which Mrs. Reardon said she had made, which is the reversal of the panel in the Rosenthal Patent, here as Plaintiff's Exhibit 17B, and will you again refer to the same point you made a moment ago with respect to the reversal of the panel? A. The Rosenthal patent, Exhibit 5, I believe, if we were to reverse the panel of the Rosenthal garment and put it on the outside rather than laying it underneath, it is my opinion that we would have essentially the same garment as that covered in patents '300 and '301.

Q. You are now referring to the garment which is here

as 17B, right? A. Yes, sir.

It has an encircling elastic body girdle, it has an overlaying panel that is stitched down on both sides to a point near the bottom of the encircling girdle, attached to a stretch panel going through the crotch area coming into the back side and fastened to the back of the garment in a V form back here.

The Court: Isn't there a difference in the fact that the panel is on the outside puts pressure on the (102) encirclement?

The Witness: Yes, sir, but it does on the inside, also, because it is stitched down, your Honor. If it were not stitched down inside it would not put any pressure on the encircling member here. But it is stitched down making it an integral part of the encircling basic gardle. Therefore, the panty girdle does or the panty crotch piece does put downward tension and more abdominal control because it is attached.

If this stitching were left out and it were merely attached to the top, in other words, it would not, this would be a complete overlay and work independently of it. That is not the case.

It is stitched down and becomes an integral part of it, a basic panel inserted in the front of the girdle for reinforcing factors, and the crotch piece attachment at the bottom pulling it down tightens it and makes it an integral part of the panel at the bottom whether it be on the inside or the outside.

The Court: What about as you get toward the crotch, isn't there some element of support or whatever you might have down in here towards the crotch which is not existent in the Rosenthal and does exist on the Olga?

The Witness: It exists in both ways in my judgment, your Honor, because the overlay or underlay panel is (103) the portion that creates the tensioning. Whether it overlays the encircling straight portion or underlays it, the tension comes from the piece that runs vertically from the top of the girdle down through the crotch and attached to the back.

That is where your tensioning factor comes from. It comes in this particular garment as well as in

the reverse garment as it does in the Erteszek '300—'301, I beg your pardon, at this particular point.

Q. That garment here is Plaintiff's Exhibit 15 which duplicates the '301 arrangement, is that correct? A. It does except for modifications of it to the extent of making a wider panel using a different actual power net, but then that can be determined. There is a wider panel and it overlays rather than underlays as compared to the Rosenthal patent.

The Court: What do you have in your hand right now?

The Witness: I have the garment in question.

Mr. Taylor: That is admittedly the construction of the '301 patent.

The Court: This is 15?

Mr. Taylor: That is 15, that's correct, your Honor.

(104) The Witness: You have an encircling elastic body made of various quadrants and such, you have an overlay in that particular case, overlaid wide elastic panel narrowing down and attaching to a crotch piece that goes through and attaches to the back of it.

You have identically the same concept in the Rosenthal patent, except it underlays you. We are showing you in these two how it looks underlaid in its original form, but saying had it been reversed slightly and put on the outside we would have for all practical purpose have the garment in question item 15.

Mr. Taylor: I have no further questions of this witness.

The Court: All right, Mr. White.

Cross Examination by Mr. White:

Q. Do you have a copy of Exhibit 1 in front of you? A. Yes, I do.

Q. Look at claim 1, please, on column 2, line 42, of Exhibit 1.

Let us look at Exhibit 5 for a moment, which is the Rosenthal Patent.

What have you to say as regards the degree of torso encirclement of the elastic portion of the Rosenthal garment (105) as shown in Exhibit 5. A. I am not sure I understand what—

Q. What area of the—his Honor has the best word I have heard yet to describe that—the midriff. Where does that extend, from where to where vertically speaking on the midriff of the wearer? A. It essentially covers the abdomen of the wearer, the upper hip portion—

The Court: Which are you talking about now? The Witness: I am talking about the number 5 Exhibit, the Rosenthal Patent.

That was the way the question was asked.

Q. Yes, it does. Turn to this drawing Fig. 1.

Mr. Taylor: Do you want the model? The Witness: That is all right.

Q. Fig. 1. The top horizontal line in Fig. 1 conforms to the waist of the wearer? A. Yes, sir, as I understand it.

Q. A woman's body tends to sloop outwardly from the waist to a maximum width at about the hip portion and then sloops inwardly, is that correct? A. Generally correct, unless she is very low thighed.

Q. The point I want to have you agree with is that (106)

this encircles the midriff of the wearer from the waist down to a line which, on Fig. 1, one could represent by drawing a horizontal line parallel with the waist line reaching from the peek of the leg opening on the left straight across horizontally to the peek of the leg opening at the right. Is that not correct? A. Well, it encompasses that portion. It is a question of how much that portion is.

Q. But this fabric is stretchable in the horizontal direction, is it not? A. Yes.

Q. Looking at the rear of the garment which is shown in Fig. 2—

The Court: I am not sure about that.

Am I correct you asked him if the body encirclement extended from the waist down to, let us say, the maximum width of the hip?

Mr. White: Yes.

The Court: Isn't that what you asked him?

Mr. White: That is a way you asked him, and not below that.

The Court: And what you are referring to is the line—

The Witness: If I understand it, he wants a paral- (107) lel line from here to here. It is a question of how far down on the figure it fits and that is questionable, because there is no way that the patent says how many inches or on a different figure how far down it fits.

It fits down well into the side hip area.

I don't know what you are asking, sir.

Q. Let me get at it this way: Can't you for purpose of talking about the torso encircling element here in Exhibit 5 talk about just the part going from the waist down to the top of the leg openings? A. If we talk about that portion, what shall we talk about?

Q. You have been comparing different elements in Exhibit 5 with different elements in the Olga Patent in suit, have you not? A. Yes, sir.

Q. And you have been drawing an analogy between the body of the Rosenthal garment, which is shown by numeral 3, I guess, in figure 1 of Exhibit 5, and the torso encircling component, shall I put it, of the Olga patented garment, right? A. Yes, sir.

Q. What I am trying to get you to agree with me is that in Rosenthal that torso encircling element and analogy, (108) if I can put it that way, is only that portion of the garment which extends from the waist down to the tops of the respective leg openings and not beneath there. A. As far as a straight encircling straight girdle, yes, but in the back of this when you drop it down lower below the buttocks area in the back.

Q. But that is not doing any girdle function down there, that is exactly the point I am making. A. It is when attached by garters.

It is around the body, but when you put the panel you work the front and the back in concert with each other.

Q. Let us pursue each other.

I am glad you pointed out the essential quality of the garments.

To hit that one home, there is no doubt, is there, Mr. Lands, that this garment must be worn with garters? A. I do not agree with that whatsoever, because the panty brief portion, the crotch area of this, is the anchor portion in the garment.

Q. Have you read this patent? A. If you take the garters off of them and throw them away you will still have essentially the same garment.

Q. Have you read this patent? A. Yes, sir, I read it very well and I know what the (109) patent says. I also know what the garment does regardless what the patent says.

Q. Let us talk about what the patent says, all right? What does the patent say? Was not my statement accurate representation of what the patent tells you, Exhibit 5? A. I have to go back and exactly reread the exact words in the patent, but the garters are not an essential part in order to hold this garment down and make it a functioning portion, in other words.

The Court: While you are looking about the garters—Mr. Lands, if we were considering the area or the part of the body where there was a kind of girdle effect, it would be the kind that was fully wrapped around, right?

The Witness: Yes, sir.

The Court: You have a full wrap around beginning with the waist line down to the bottom of this line at the right and at the left.

There are two straight lines going down.

The Witness: As far as the body encircling member, yes, sir.

The Court: That is the body encircling member. If you get below that you have material, but there isn't anything encircling the body below that, is there?

The Witness: There would be in the back, your Honor, (110) in a straight girdle and if it did not have the crotch member in it you would then have to have garters to hold it down because it would be nothing else anchoring it.

The body encircling portion of the body would run longer in the back if it did not have the brief or the crotch attachment in it.

The Court: In the front the only body encircling or girdle effect is just down to the point that the straight lines cross.

The Witness: Yes, sir.

The Court: I am talking about Exhibit 5, Fig. 1.

The Witness: Yes, sir.

The Court: You are telling me in the back you have a girdle effect below that, is that right?

The Witness: If this were a straight open bottom

girdle without the crotch-

The Court: Tell me about this Rosenthal garment. In the back is there any girdle effect below that straight line that runs between the bottom end of the two lines?

The Witness: Your Honor, there is when you have the crotch attachment, yes, sir.

The Court: Is there a crotch attachment on this garment?

The Witness: Yes, sir, there is.

(111) The Court: So you are telling me in this garment with the crotch attachment there is a girdle effect down low in the back?

The Witness: Yes, sir.

The Court: And that is caused by what?

The Witness: Well, in this particular case because of the crotch attachment that goes from the center front panel through the crotch area and is attached to the back of the circular girdle.

The Court: And it pulls the back down and in? The Witness: Yes, sir, it pulls it down and in underneath the buttocks or the derriere, whatever you want to refer to it as.

- Q. Look at Fig. 2 on that same point just briefly, Mr. Lands, on Exhibit 5. A. Yes, sir.
- Q. That shows the back of the garment, does it not? A. Yes, sir.
- Q. Would you explain that the reference number 5 points to in that view? A. The extension of the crotch piece. It

is inserted in the garment. That is an extension of the

front panel.

Q. But the material of that extension, which is marked numeral 5, is non-elastic, is it not? (112) A. I think they refer to it—I don't know, I would have to go back and make a reference on this.

Do you want to point it out exactly where you have reference, you may take the time to find it.

Q. It is column 1 at line 38.

The elastic girdle at its back area is cut with a deep V formation into which is seamed an insert 5 of soft fabric, which insert extends upwardly in band formation and is connected at the line 6 in Fig. 1. A. Attaching to the front panel?

Q. That is the front, 6, and the back goes up into this

V insert. A. Yes, sir.

Q. So that is to say this horizontal line I am speaking of, this imaginary horizontal line from the tops of the leg openings in Rosenthal, passes right over the top of this V, does it not, in the back view?

It is pretty much— A. For all practical purpose, yes,

it does.

Q. So again, the only elastic thing that this crotch portion is pulling on is above that imaginary line, to all intents and purposes, isn't that so? A. I absolutely disagree with you. It is not pulling just on that imaginary point that runs horizontal from the upper (113) portion of the outer legs across.

The elastic that is in the encircling member of the garment that comes below that imaginary line is also working because the V, item 5 that you referred to, that is stitched into it in the back and is also stitched down at a much lower point than your imaginary line so it is working the garment down to and underneath the body.

Q. Would your answer be different if this were an uni-

directional fabric in the sense it didn't stretch vertically but only horizontally? A. No, it would still work. It would be a question of the degree.

The Court: The material in the crotch piece, how does that stretch?

The Witness: Well, I don't know how he has-

Mr. White: It is rigid to all intents and purposes? The Witness: It is not our understanding it is rigid. We understand it is a tricot type fabric as the definition that refers to here although it does not specifically refer to it as tricot.

Q. It is non-elastic? A. It is non-elastic.

The Court: It says soft fabric.

The Witness: Generally in the industry a stretch (114) fabric of this type is tricot which is used in a portion like this, unless you go to an elasticized fabric. That is mostly generalized usage.

The Court: Is that what would be used for item

5, tricot?

The Witness: Generally speaking, your Honor, that would be the type fabric.

The Court: That is not elastic? The Witness: It is non-elastic.

The Court: But does it have any stretch?

The Witness: It has some stretch in that it is knitted and virtually all knitted fabrics have vertical stretch. It would be our interpretation that this would be the general type thing to be used in this garment, although we never saw it.

Q. By the way, this was not what you would call a commercially successful garment, wouldn't you agree with that? A. I was only aware of it in very limited forms.

The Court: What is the answer? Was it commercially successful or not?

Q. Yes, or no.

The Witness: They successfully launched it and, therefore, Maidenform seemed to think it was successful or they would not have put it on the market. They not only put it (115) on the market, they spent their money to advertise it.

Q. How about your opinion? A. It is a question of the degree of success.

Q. Was it commercially successful? A. I cannot answer that. I don't know. I don't have facts available to me to know how many of these they sold.

Q. Do you recall your deposition being taken in this case on November 19, 1968, Mr. Lands? A. I do.

Q. Do you recall testifying as follows about-

Mr. Taylor: What is the page, Mr. White? Mr. White: I am on page 37. This is a long answer that begins on page 36.

Q. "Were you aware of a panty girdle garter belt product of theirs during this period?"

This means, again, the Maidenform company in the 1950's.

Then you said, "Are you talking about two things, a panty girdle and a garter belt? Are you raising that as two different items?

"Question. No. I am talking about a compound item. "Answer. I don't know how in the world you could combine the two per se, but during the fifties Maidenform got into the foundation business."

(116) Then you talked a lot about how Maidenform got into the foundation business.

Then on page 37 continuing that answer you testified as follows:

"I don't know whether this is the garment you are referring to or not, I don't recall the number. It didn't survive. I believe I am correct. I don't believe any of the garments they launched at that time survived, but they did come out with a series of garments during the fifties and I was aware of this, yes."

Did you give that testimony? A. Yes, sir, I did.

Q. Are you familiar with Exhibit 14, which is a Maidenform advertisement in evidence in this case? A. Yes, sir, I am.

Q. Does that tell you anything about the use of garters with this Rosenthal garment? A. They refer to it as a combination garment, I referred to it in my testimony initially that in essence you don't have a combination garment, you either have a panty brief that has garters attached, semantics notwithstanding. You can call it a garter belt if you choose, but in truth it is not a garter belt in the true sense of the word.

Q. What does the patent call it, Exhibit 5? (117) A. It calls it a panty girdle, a girdle and garter belt.

Q. All mixed into one? A. Yes. That is what they refer to it as.

The Court: You referred to an ad?

Mr. White: I am about to.
The Court: Is that in evidence?
Mr. White: Yes, Exhibit 14.

It speaks for itself. Would the Court read down on the bottom.

Shall I read it into the record?

The Court: Why don't you do that. I think it would help.

Mr. White: The ad is entitled, "I dreamed I sold a garter belt with every Maidenform Bra, and that dream is not as impossible as it sounds, not when you see the complete new line of Maidenform garter belts. Think of it . . . an extra sale . . . with every sale. Sweet dreams, wonderful figures, beautiful business. Courtesy Garter Brief, 1774, steals the show. This new combination garter belt and panty brief is 100 per cent Dacron. The lightest wearing, quickest washing garment you can offer your customers. The new different apron construction makes for a wonderfully smooth line even under slimmest sheaths. The attached garters positively prevent (118) riding up. The front panel for tummy control and the back is biased cut for sitting ease."

Q. It is clear, isn't it, that this Rosenthal garment was promoted as a garter belt as well as a panty brief? A. That is obvious from the ad in a sense, but it also mentions elasticized garter brief, too.

Q. It also tells you that to prevent riding up it is advisable to use garters, doesnt' it? A. It does not say it is advisable.

Q. It says, "attached garters positively prevent riding up." Doesn't that tell you if you don't want it to ride up you wear garters? A. It says if you do have them attached it positively does prevent it from riding up. It does not say that if it is not attached it will ride up.

The Court: Can I ask you, was this sold with garters not on it? I mean, was this something you optionally put garters on or took them off?

The Witness: The basic patent does not indicate that, your Honor.

Q. Look at line 51 of the column 1 before you are so quick to answer it. A. Look at the actual photograph, also.

I say that the patent does not refer to that.

(119) The Court: You are referring to this Exhibit 14 and you say that is attachable?

The Witness: This is attachable or detachable in this particular case.

The Court: Are you sure?

The Witness: Yes, sir. There is a better copy of that somewhere that was put in evidence.

Q. I can't see that. A. You may not be used to looking at attachable or detachable garters, either, Mr. White.

Q. Let us begin from the beginning.

The patent clearing says that they are there and it does not in any way, shape or form even suggest that they may be omitted. Will you agree with that? A. The patent does not say that.

Q. The patent further tells you in column 2 at the top that the front of the garment is pulled down by the straps applied thereto, is that not correct? A. That is what it says, yes, sir.

Q. The ad, Exhibit 14, also tells you that the garters are what prevent riding up, is that not correct? A. It does not say prevent riding up, does it, it says it keeps it—

Q. Positively prevents riding up to make it even more (120) emphatic. A. It says that, sir.

My point was and is-

Q. Please don't. I shouldn't interrupt you, I suppose, if you want to say something. A. Well, it was part and parcel of the testimony that I just made that the garters do not have to be attached or even on the garment to keep it from riding up.

The Court: Why is that?

The Witness: There is no way it can ride up, your Honor.

The Court: Because the leg openings are so high or-

The Witness: The insertion of the front panel and the crotch member is what holds this garment down. If it were not so then it would be riding up on this torso, but it is not riding up on this torso nor will it ride up on the torso.

At the very maximum the most it could ever ride up would be something like this with the garters detached or not attached.

This is what is holding the garment down. It is holding it from this point through the crotch around to the back and it very clearly shows in the ad that the back portion of this garment comes down well under the derriere, so that (121) this crotch member is holding this back down very, very low. You refer to the Maidenform ad where they have the front and back view of it and it very clearly shows it.

- Q. Let us go back. You attempt to belittle this wrinkle that you put in this garment. That is really unacceptable, isn't it? A. I say that is the maximum that it can ride up.
- Q. It ruins it, doesn't it? A. Not in my opinion it wouldn't ruin it.
 - Q. Do you wear these? A. No, I don't.
- Q. You sold it. Is that acceptable? Does the woman want that in front of whatever this garment is? A. If I were designing the garment I wouldn't put it like this, no, sir.
- Q. Of course not. In fact, you couldn't see one if you had one like that, could you? A. I have no way of knowing that, sir, nor do you.

Q. It looks as though we are just arguing things here. A. My only point was that the garters are not an integral part to maintain or hold this garment down and in place.

Q. But you are at least now going to agree with me that the only authentic evidence, not based upon your reconstruction (122) now, that we can date prior to Mrs. Erteszek invention is contradicted by what you have just said?

The Court: I don't understand that, Mr. White.

A. I don't say it contradicts it, it merely says it positively keeps it from riding up. It does not say it would ride up otherwise, sir.

> The Court: I think we have had enough on that subject.

Q. The panel, looking at Claim 1 of Exhibit 1 again, the panel is not only underneath instead of overlaying the body portion in the Rosenthal patent, but it is not "a wide upper panel of elastic material," wouldn't you agree? A. It is not as wide as the Erteszek '301 panel, no, sir.

Q. And it is not of elastic material? A. It was my under-

standing there was one way stretch material.

Q. The panel now. A. The panel, the insert panel, I was of the impression that it was a one-way stretch or down stretch fabric. I may be wrong in that regard.

Q. Mrs. Reardon said that was not, the patent does not tell you one way or the other and she made it out of rigid material, so neither the patent nor your mock up has a panel of (123) elastic material, correct? A. I don't know which is correct, sir. It was her interpretation. I am telling you I don't know which way to interpret it, whether it has elastic. If I were making a garment I would certainly put a vertical elastic at that point. If she chose not to, it was a judgment. It is not, to my knowledge, listed specifically in the patent.

Q. Don't argue with me, Mr. Lands. The patent does not teach, disclose an elastic panel, right? A. To my knowledge you are right.

Q. Your mockup has not got an elastic panel, right? A.

Correct.

The Court: What does the mockup have, just rigid material entirely?

Mr. White: Yes, sir.

Q. And that panel does not overlay even if it is underneath a substantial portion of the front of the body, right? A. This has a tricot fabric, nothing more than a standard tricot, which is a stretch fabric.

Q. I thought you said it was not a stretch fabric, you said it was knitted? A. You made the judgment it was not and I said I don't know, if I were making the garment or if I were supervising I would have put a stretch fabric. She has chosen to put a (124) tricot, which is a stretch fabric.

Q. It is not an elastic fabric? A. No, sir, it is not an elastic fabric.

Q. Which is what the claim calls for in the '301 patent. A. Yes.

Q. Furthermore, this panel, such as it is, does not overlay a substantial portion of the front of the body, does it? A. No, sir. A portion, but not substantial portion.

Q. And it is underneath and not on the outside, as you

have said so often? A. Correct, sir.

Q. Going away from the claim for a moment, then it is clear that the panel, such as it is, has not got the capability of stretching relative to and independently of the body? That's correct, it is not? A. The front panel—

Q. Has not got the capability—I am looking at the patent now in column 2 at about line 23—the panel has not got the capability of stretching relative to and independently of the body? A. I have already testified it is tricot and, therefore,

it would stretch, sir. It is a knitted fabric and all knitted fabrics have a tendency to stretch to some degree, tricot (125) fairly substantial.

Q. Tricot being knitted is a stretch only in one direction, isn't that correct? A. But it has a diagonal—it has a two-directional stretch. It has more stretch in one direction than it does, but tricot has a two-way stretch, yes, sir.

Q. It stretches in the direction of the fill as distinguished from the warp? A. Well, I don't know just the technical terms to that extent, I don't want to get into that end of it.

Tricot does have a two-way stretch.

Q. On a bias? A. No, it has a vertical and a horizontal and also a biased. The vertical and the horizontal have a differential of stretch. It is the question of the degree of stretch, sir.

Q. You don't make-

The Court: What is the point of— The Witness: He is contending—

The Court: We don't know what Exhibit 5 was

even designed for.

The Witness: We do not, he is saying it has a rigid fabric and I say I don't know that, your Honor. This particular one was made in tricot, which is a stretch. I don't know how it was fully intended, sir.

(126) Q. Have you ever seen a garment that I hand you, Mr. Lands? Look at it carefully. A. Yes, sir, I think

we had this which you loaned it to us one day.

Q. Which do you think looks more like Exhibit 5, the garment in your hand or the one on the form Exhibit 17A? A. Well, we have to put it on a form because when you have it on the form you are working the fabric and you have a differential.

Q. Do you want to put it on the form? A. Yes.

The Court: Mark that, please.

(Defendants' Exhibit A was marked for identification.)

Mr. Taylor: If your Honor please, I have been after the defendants for almost since the outset of this case to get me a sample Rosenthal garment which was exhibited to the Patent Office in the course of the prosecution of this case and I also attempted at one time to even mark this garment that is now being handed by Mr. White as a Plaintiff's Exhibit, but they objected in that it hadn't been proved or established as to its authenticity.

I gave it back to them and, therefore, I had a sample of the Rosenthal Patent made by Mrs. Reardon in order to have what I considered to be a garment which could be (127) exhibited, and I object strenuously now on two grounds to even a consideration of this garment.

One, that there has not been in any way indicated in this case to date the structure of the very critical Rosenthal garment which was used to try to convince the examiner to allow this patent and, secondly, that in all of my attempts to establish the authenticity of the garment that Mr. White is now using I was rebuffed.

I object strenuously to the fact that it is now brought in at this date without any indication of their reliance there upon or any excuse as to why I was not furnished with the garment.

Mr. White: This is cross examination.

The Court: What was the occasion when you sought to have this item marked for identification?

Mr. Taylor: In the course of the arguments with respect to the compilation of the pretrial order.

I will show you the portion that was crossed out at the insistence of Mr. Coch's objection, who joined me at the time of the conference.

This crossing out was done by the pretrial order, if you will look at paragraph numbered 14.

The Court: Was this proceeding before an examiner?

Mr. Taylor: No.

(128) The pretrial order hearing was before an examiner, yes, your Honor.

The Court: And this particular garment was on hand and you wanted to have it marked?

Mr. Taylor: That's right, just as recited in the paragraph that you are now observing.

The Court: Who was it that objected to that?

Mr. Taylor: Mr. Coch, the associate of Mr.

White here in the courtroom.

The Court: What was the ground for that?

If this is correct, I mean, this does not mean that this garment can't come in, but we have spent a lot of time with a mockup which Mrs. Reardon made and we spent a lot of time in the court here on that mockup, and if there was a real Rosenthal garment available I haven't the faintest idea why we had to have a mockup at all.

Mr. Coch: Your Honor, if you will like, I will explain what happened at the hearing.

Mr. Taylor had it on his list and I objected to it.

The Court: Was it physically there?

Mr. Taylor: Yes, it was. Mr. Coch: Perhaps it was.

The Court: You knew what it was, didn't you?

Mr. Coch: I was the one, your Honor, who obtained (129) that garment. I called the Maidenform Company and through their good offices they sent me that model.

The Court: And you asked them for what?

Mr. Coch: Mr. Taylor took my testimony about how I obtained that garment.

I just objected to the garment. I wanted someone to—

Mr. White: No, no. What you did ask Maidenform for?

Mr. Coch: I asked Maidenform for a sample of the courtesy brief which Mr. Taylor was relying on.

The Court: What we are speaking of as the Rosenthal?

Mr. Coch: Yes, your Honor. In fact, I put it in those terms. I did not know at that time that there was a courtesy brief. I asked them if they had ever made the garment depicted in the Rosenthal patent.

The Court: My only problem is that we spent a fair amount of time with a mockup that apparently all could have been saved by just using this other item.

Mr. White: No, because the other side never took a deposition to establish the date of manufacture.

The Court: You knew what it was?

Mr. White: No. When you write to somebody and say send me a sample of something, you don't want to have that (130) going in unless the man attacking that patent proves it.

The only reason in the world I am bringing that out now is—never mind. It doesn't matter. It is just wasting time. I wanted to show the garters.

The Court: I don't think it is wasting time. If somebody has the Rosenthal garment, I think it ought to be here in place of that mockup.

Mr. Taylor: I do, too, and I have been trying since almost the beginning of this case to obtain a garment of that kind so I wouldn't have to—

Mr. White: We gave it to him and he never once took a deposition to establish what it was.

Mr. Taylor: I beg your pardon, I examined Mr. Coch with respect to all the things that he stated here today, and if there ever was a time when there shouldn't be any objection made with respect to my use of that garment it was then and there, and it has not been changed since the date of the pretrial order with respect to my availability of the Rosenthal garment.

The Court: Mr. Coch, is it your best information that that is a garment based on the Rosenthal patent?

Mr. Coch: I was told by the lawyer for Maidenform that this was a garment taken from their files on the phone and that is all I know about it.

(131) The Court: Have you compared it with the patent Exhibit 5?

Mr. Coch: Yes, I have, your Honor.

The Court: And it is a lot better facsimile of Exhibit 5 than that Exhibit 15, is it not?

Mr. Coch: Yes, your Honor. Mr. White: It certainly is.

The Court: If anybody wants to introduce it, I will certainly admit it.

Mr. White: I offer it as Defendant's Exhibit B. Mr. Taylor: I object to the receipt of it on the grounds it certainly should have been produced long before this time.

Mr. White: They had it two years ago.

Mr. Taylor: You had it two years ago, Mr. White. The Court: Excuse me. I will overrule the objection and it is received.

The next question is that he says he has not been furnished with the garment, although he requested

it, the sample that was furnished to the Patent Examiner as being the Rosenthal item.

Mr. White: Yes.

The Court: Let us have something on that.

Mr. White: I respond to that.

(132) Mr. Taylor, at the outset of this action, deposed the patent lawyer in California who represented the Olga company in prosecuting the applications that matured into the patents in suit. At that time he questioned that lawyer in depth as to the whereabouts of such garment that was exhibited and was told under oath at that time it was not preserved. It was brought there and left there and the patent office looked at it and they brought it home. It was not preserved nor the patented garments, the drawings of which were submitted to the patent office.

That was told to him by this lawyer at the outset of this case five years ago and he is screaming his head off since to get it—

The Court: He has asked for it and he was told it had not been preserved, right?

Mr. White: Yes, your Honor.

The Court: I think that is the state of the record now.

I will say as to Defendant's Exhibit A, if you want to examine Mr. Lands about Exhibit A, you may do it, so we will leave it at that.

(Defendant's Exhibit A was marked received in evidence.)

Mr. Taylor: May I make one more remark, and that (133) is that I was not even furnished with a sample of the '301 garment of Olga at the time that

I made this deposition, and if there ever was a garment that has ever been represented as a basic to all basic as to their contribution it was the '301 patent which was filed in November of 1962, and they never produced a garment which was in accordance with '301. I had to have that made and, of course, Mrs. Erteszek, whom I examined out in Pasedena, agreed that it was precisely in accord with Figs. 1, 2, 3 and 4. But they never gave me even the Olga garment, which was submitted to the examiner.

The Court: Let us go ahead.

Q. Do you observe that Defendant's Exhibit A as placed on the form rides up? A. It has a train effect in the front only.

Q. Can't you say yes to a question which seems to me self-evident, Mr. Lands? A. Well, the garment is not riding up per se, there is a small front panel portion that is riding up, Mr. White. I can't tell you that the whole garment is riding up because it isn't, sir.

Q. And isn't it also obvious that the garters prevent that riding up? A. That portion of the garment, yes, sir.

Q. By the way, in order to really see if the garment (134) rides up, Mr. Lands, isn't it really necessary to put it on a live model and have her do a couple of deep knee bends and sit down and cross her legs and so on? A. We always do that before we market a garment, yes, sir.

Q. That is really the way, isn't it, to see if it rides up? A. You usually can tell more about it than on a rigid form, yes, sir.

Q. Isn't it also self-evident that on Exhibit A the garters are permanently affixed to the garment? A. They are in this particular case, yes, sir.

It certainly appears in their national ad that was introduced in evidence earlier that they are detachable garters.

Q. Would you point to where it says that, since you have made that flat statement. A. It does not say it, sir, I said it appears that the garter tapes in the front of this are detachable. It gives every appearance of being both in the front and back portion of the garment. We will show you what the detachable garter is if you would care to look at it.

Here is one in evidence on the other garment here. It does not say that they are detachable in the patent, however.

Q. By the way, you see without even trying this same (135) riding up effect occurred on Exhibit A the minute that I released that pressure, is that not correct?

The Court: We saw that. I think we have had enough on riding up. I can see it with my own eyes.

A. It is also fitted low in the back underneath the buttocks and the derriere, substantially below the imaginary horizontal line.

I would like your Honor to note that.

Here is approximately the so-called horizontal line that was being referred to earlier as being the only portion that was an integral part of the fit of the garment.

I contended before and it certainly is in evidence here that that point below this imaginary horizontal line is part and parcel of the integral part of the fit of the garment also.

Q. The panty brief that you spoke of at the outset of your testimony as having been something that has been around since time immemorial is well illustrated by Exhibit 18, is it not? A. Basically, this is what has been referred to as the panty brief through the number of years that you have been associated with this industry.

Q. What are the deficiencies of that garment? A. None

for what it is designed to do. It even circles (136) the body and it has an abdomen, hip and derriere control to a limited extent.

You can impose additional restraints on it by putting panels on it.

Q. Is it comfortable around the leg openings? A. I have never worn it, sir. I have no idea. I would think that it would be reasonably comfortable otherwise they would not have it on the market and sold the dozens that they apparently did, because it was in broad evidence across the nation on a retail level for a number of years.

Mr. Taylor: May I ask one question there just for the record, if your Honor please? It has to do with the identification of the garment.

That is the famous Janzen garment, Janzen being the manufacturer of swimsuits and so forth?

The Witness: Yes, sir, as I would know it. It certainly is one of the versions of it.

Q. Could we describe that accurately as a brief made out of elastic fabric? A. Yes, sir.

Mr. White: I am wondering if the Court would care to test the strength of the material with which it is made, because I think it is relevant.

The Court: As being more or less strong than these (137) others?

Mr. White: Yes.

Q. Does that have as much controlability into it as your 40-28 garment has? A. No, because it does not have overlaying panels and such.

The kick of the elastic, Mr. White, is a questionable thing. I don't know. We can run various and sundry tests on it if you would like.

It has approximately the same kick as the body encircling member, yes. To what ever extent I couldn't verify.

The Court: The basic difference is no panels, is that right?

The Witness: No panels, yes, sir. When you introduce a panel you do have some additional control or usually do. That is the reason for putting a panel in.

- Q. One thing about panels—let us talk about panels for a moment—do you equate in your own mind or is it of any significance to you in the Olga garment or in the one that is involved here, 40-28, that the panel stretches independently of the underlying fabric? A. I don't know. When you put the overlaying panel you add some additional control in the abdomen area. I don't know that it means anything whether it is free or not. That is a (138) question of the individual wearer's attitude toward the individual garment?
- Q. But a freely mounted panel, one that has the capability of independent stretching, is not the same as a panel that is stitched clear around its circumference and, therefore, it merely represents a double layer of fabric. A. It probably would have less control than one that was stitched down completely.
- Q. A regular panel that is stitched all the way around is riding on its stitching on all directions, is it not? A. Basically, yes.
- Q. No independent stretching of the panel portion. A. You have independent stretching. If you stitch it top side bottom, no. The two panels will tend to work simultaneously with each other if the grain of the material runs in the same direction?
 - Q. And the function of such a panel that is stitched all

around its circumference in one of these girdles, the result of that on the fabric is to make the double thickness part, the panel part, less stretchable, wouldn't you say? A. It gives it more control, more abdominal control or more con-

trol over the area over which it applies.

Q. It merely transmits stretch from the area of itself, of the double thickness, out to the areas to the right (139) and left beyond the panel, wouldn't you say? A. It will increase the stretch beyond the panel because the stitching tends to lock this portion and, yes, it will tend to put additional tension on the outer portion of it.

The Court: I am going to have to ask you your in-

dulgence.

I really missed something in the discussion of the panel. If you could just go over again, even though you will repeat, what exactly is the function of the panel.

I understand—

Mr. White: Let us take the Gossard panel, your Honor, just as a point of comparison if I might.

The Court: If you theoretically could have heavier material in the area of the panel, if the material could somehow become heavier, it would accomplish the same thing, I take it?

The Witness: Not just for the sheer bulk of it. It would be the kick of the elastic, the stretch or non-

stretchability of the elastic, the restriction.

The Court: Do I understand that if you have a single thickness here, it stretches easier than where you have a double thickness?

The Witness: Correct, sir.

(140) The Court: And that tends to push the stomach in, right?

The Witness: The abdomen, yes, sir.

The Court: What was the point that you were getting at about the effect on the area past the panel?

Mr. White: I think the witness has agreed with me, I am trying to contrast with the garment of the patent in suit one such as the Gossard one of the prior art types of panels that are sewed completely around and merely represent a thickness of the cloth in that area.

It is a doubling of the cloth in that particular zone of the garment.

The Witness: In the case of the Gossard it is a completely restrictive, non-stretch woven fabric that is inserted in there.

The Court: Where is the picture of the Gossard? The Witness: We have the actual garment, your Honor.

The Court: Do we have the Gossard garment?

Mr. White: Yes, we have that. This is a modern version, not from the prior art.

Mr. Taylor: Here is Plaintiff's Exhibit 7 if your Honor does not have it and here is the garment here which is Plaintiff's Exhibit 20 for identification, which was objected to by the defendant.

(141) Q. Isn't it a fact, speaking of this Gossard garment that his Honor has, Mr. Lands, the effect of the super position of a stronger or even a completely inelastic panel sewn around it as is the case in this Gossard is to, in effect, to force the stretching of the garment to occur to the right and to the left of itself? A. Yes, sir. You would have more stretch with a stitched down panel than you would without a stitched down panel.

You are saying from this point out we get more kick or more control by having the stitch inserted here and you do the same thing there.

I don't know what your point is.

The Court: What do you mean kick?

The Witness: Kick is the inability or the—I don't know what the technical name is—resist stretch.

The Court: The pull?

The Witness: That is generally referred to as kick.

The Court: You put a panel in the middle and you sew it all the way around and that is the situation with Gossard.

Incidentally, Gossard is not in evidence. Shouldn't that be in evidence?

Mr. Taylor: It should be. I offered it earlier, (142) if your Honor please.

The Court: You are offering it?
Mr. White: It is a modern garment.

The Court: I think it should be in evidence.

Mr. White: All right, we will withdraw the objection.

(Plaintiff's Exhibit 20 was received in evidence.)

The Court: So you are saying that the fact you have a panel sewed all the way around, there is no stretch in that panel at all?

The Witness: Not in that particular one, your Honor.

The Court: This is the one we are talking about.

The Witness: Yes, sir.

The Court: And then since you have some rigid part, then you are saying it increases the resistance to stretch in the other part?

The Witness: Yes, sir. The Court: Why?

Q. No, no. What is happening- A. You explain it.

Mr. White: The garment is pulling on the rigid piece from the side of it.

The elastic part around the side of the garment (143) pulls on the rigid part and, in effect, pulls it toward or into the abdomen?

Mr. White: Yes.

The Witness: When you have a stitch whether it is on a rigid or overlay of comparable material or whatever, by the very inversion of a stitch you tend to tighten up the portion to the left and the right of that stitch because you interfere with its general horizontal stretch. That would be through in a side seam, a back seam or whatever the seam.

The Court: We will have a short recess. (Recess taken.)

Continued Cross Examination by Mr. White:

Q. Mr. Lands, looking again at a Gossard type garment, which would be Exhibit 20, where the panel is rigid and sewed on all sides, shall I say, and it goes down to—I forgot that this one had a crotch piece, but what I am really trying to say is that in a rigid panel that goes from the waist to some point below, this rigid panel can't shut off the function of stretching upwardly because there is nothing beyond that waist line, that is obvious, isn't it? A. There is no elastic.

Q. Pulling up above it, isn't that correct? A. Yes.

(144) Q. Similarly in a garment that is just a skirt girdle open at the bottom, that same thing is true at the bottom, is it not? I mean, there is no material there to pull down?

The Court: It is clear to me what your question was so I really wouldn't understand any answer. What is your question?

Mr. White: I was picking up where we left off, your Honor.

Q. A panel that is sewed on all of its sides so that it is nothing more than attached on all sides to an underlying piece of cloth, elastic cloth, depends for its flattening function upon having attached to its sides some elastic material that, if turn, in turn, is holding against a portion of the body? A. Yes, the elastic material pulls the rigid fabric down to the body. Yes, sir.

Q. And that is not true, however, of a panel, obviously, which is unattached on one side and so affixed that the unattached or the panel, therefore, can be pulled and stretched independently of the underlying fabric? That is self-evident, isn't it? A. Well, when the panel is attached on three sides or on any portion of the sides, it then becomes an integral part of the pulling of the rest of the body adjacent to it.

(145) Q. But taking this Rosenthal mockup, the point is since this is, as made, a non-flexible piece of cloth, the cloth on the panel as it overlays in this case or underlays the outside, is not elongated, isn't that correct? A. We discussed earlier we don't know what the inner panel is. We put tricot in which does stretch, but I don't know what the original garment had in it, sir.

The Court: Let us take the Gossard. You have material pulling the panel on two of these curved sides, right?

The Witness: Yes, sir, you do.

The Court: So it will pull that panel against the body from the side, from an angle down, from another angle down and from the other side, right?

The Witness: In this particular case, yes.

The Court: Since there is nothing on top because you are at the top of the garment, naturally there is not going to be any pulling from above.

The Witness: No, sir.

The Court: Isn't it just that simple, you have pulling going on on every side where there is stitching?

Mr. White: I am not sure. We will have to have other testimony about the bottom on that garment, your Honor. It is not free for stretching independently of an underlying (146) portion.

The Court: On this, is there pulling from the sides. We are talking about Gossard Exhibit 20. There is pulling from the sides, right?

The Witness: Yes, sir, it is.

The Court: You have a crotch piece-

The Witness: That is pulling from the panel.

The Court: From the bottom?

The Witness: But it is also pulling independent and free from the rest of the body by the insertion of this little membrane here.

The Court: You say there is pulling going on from an angle down, right?

Mr. White: By the legs? The Court: By the legs?

The Witness: Yes.

The Court: There is an elastic that runs along the leg opening that does pulling?

The Witness: Separates the crotch area from the basic elastic body.

The Court: And there is pulling from the crotch piece directly down, right?

The Witness: Yes, sir. The crotch piece is directly pulling down on the rigid panel in the front.

(147) Mr. White: May I have Exhibit 26, please? The Court: What is 26?

Mr. White: We are going to have the witness identify it, your Honor. It has not been identified.

Q. What is identified as 26? A. It is a Vanity Fair brief style 40-6 or BK40-006.

Q. That was an item that was sold by the plaintiff prior to the time that it began to offer Exhibit 23, is that not correct? A. If memory serves me, that's correct.

I have to go back and check. That's the reason we brought the catalogues.

The Court: 31-6.

Mr. White: Yes, your Honor. That is the style. The Witness: Well, 31-6 is a misnomer in that case.

It actually should be 40-6.

We codified our numbers from a 31 digit to a 40 whatever it is.

The Court: This is an earlier garment that was marketed by Vanity Fair, right?

The Witness: Yes, sir.

Q. Isn't it fair to say that immediately prior to your offering of Exhibit 23? (148) A. Now, let me get straight what 23 was.

Mr. White: May we have Exhibit 23.

The Court: That is the infringing or alleged infringing garment.

A. A review of the notes indicate that it was on sale prior to the introduction of the 40-28.

Q. And Exhibit 26 was unsuccessful, is that not correct? A. No, sir. We felt it was quite successful in line with the family to which it was attached, which was a 41-6, 15-6, 41-8 family.

The Court: This is what you call a 40-6 model, right?

The Witness: Yes, sir.

The Court: Did Vanity Fair market it?

The Witness: Yes, sir, it marketed it, I believe, from 1964 to 1967.

The Court: You say it was successful?

The Witness: We certainly would not have kept it in our line for that number of years had it been unsuccessful, sir, because we could not have afforded the luxury of keeping multiple colors, et cetera, which we merchandised with a substantial number of colors.

The Court: So you are telling me it was successful?

(149) The Witness: Yes, sir, in our judgment it was successful.

Q. On your deposition, did you not testify as follows with respect to that garment?

"Unfortunately, I am aware we didn't really succeed in our endeavor with 40-6." A. I did say that.

Q. Wait a minute. Hold it.

"It had a panel, but we could not do with that panel in the limited amount of area the same as we could do with 41-6."

What is 41-6? A. It is the panty girdle version of this.

Q. With the little legs sticking out? A. It was a version of this with quite a bit of leg sticking out.

Q. Going on, "From a constructural fit and control, so we started having reports back that it does not have enough control—give us a garment that has control, especially one that has control across the top—because we were starting to get into an interest in this area and—by this area—I am talking about across the upper abdomen."

You do admit that you gave that testimony under oath on your deposition? (150) A. Yes, sir, I did, sir.

Q. With respect to the reason for shifting over to Exhibit 23—

The Court: He has not testified he shifted.

Q. Is it not a fact that Exhibit 23 was specifically requested as a replacement for Exhibit 26? A. We had specific requests—

Q. Yes or no first. A. No.

Q. All right. A. We had specific requests for a panty brief that had more abdomen control than the 40-6. The 40-6 was an attempt to build a brief into a family that had prior existed known as 41-6, 41-8, 50-6. Unfortunately, it was not as successful in a brief form as with the other components of that family, because we could not build into this the same stretch characteristics and such.

But in line with the sale of briefs at that time, we considered this to be a successful brief. We would have carried—we would have preferred to have been a much stronger brief, but it certainly would not have been maintained in our line for three years were it not a reasonably successful garment.

The Court: The question to you was just to get (151) the transition to Exhibit 23.

I think he asked you was there a demand for-

Mr. White: Was it specifically requested?

The Court: Was it specifically requested. I don't know quite what that means. By whom?

The Witness: I don't know what a specific request is.

We had general requests for a more controlled type panty brie#.

The Court: You have gone through that now.

Was there-

The Witness: This particular design concept.

The Court: How did it come about that you designed Exhibit 23 and marketed that?

The Witness: I will be happy to go into that. We had a family that we were developing at that time that we called Keystone garment called Tapermates.

The Court: That was the name of the family of garments?

The Witness: Of that family of which 40-28 became a part.

The Court: Then what happened?

The Witness: We had a panty girdle of two lengths, a straight girdle, open bottom girdle, and we designed 40-28 (152) as a panty brief to attach with the Tapermate family and that did have a wider panel at the top.

The Court: You designed what?

The Witness: 40-28.

The Court: What is that, a panty brief?

The Witness: Yes, sir.
The Court: To do what?

The Witness: To attach as a brief part of the family, of the Tapermate family, to extend it from the panty girdle, which had two lengths of legs, to an open bottom girdle and the one extension is to make a basic brief version to attach with that, sir.

We also made a corselette. We made a total of seven garments in the Tapermate. The 40-28 was one of the 7.

The Court: We have a meeting of judges now. We will have to adjourn until 10 o'clock tomorrow morning.

(Off the record.)

(Adjourned to January 30, 1973 at 10 o'clock a.m.)

(153) January 30, 1973 10:30 a.m.

(Trial resumed.)

Mr. Taylor: Yesterday, pursuant to your request I made every effort to get in touch with my people, but unfortunately, they had all left or had been out of town, so I will have to ask your indulgence to see what I can get in the way of information to be reported on Thursday, because I don't believe that we are going to be able to reach them as I am informed this morning until late this afternoon or tomorrow.

The Court: Where are your clients?

Mr. Taylor: The president or the treasurer who acts as the spokesman for Vanity Fair Mills is coming back from Kansas and is not in New York as yet and there is no other person that I can get authorization from directly with respect to this matter in order to pursue the inquiry from, so I will have to wait until I (154) get in touch with Mr. Andrews before I can report to your Honor.

The Court: What kind of figures is it? It is simply the sale figures on this garment, isn't it?

Mr. Taylor: Yes, but you see, I haven't any basis to ask other people than those who have control of that information.

The Court: All right.

Mr. Taylor: Therefore, I am not able to pursue it any more than just as I have explained to your Honor.

The Court: All right. Let us do the best we can.

Mr. Taylor: I would like to bring to your Honor's attention the provisions of the statute having to do with appeals and I have taken a Xerox copy and I have given a copy to Mr. White.

The statute to which I refer is 28-1292-4. You will find that on the very first of the Xerox copies I have handed to you.

There it is provided that the Court of Appeals shall have jurisdiction of appeals from (4) judgments in civil actions for patent infringement which are final except for accounting.

Then I have attached pages 219 and 220 from (155)

Moore and his commentary on the statute.

Orders directing an accounting in patent infringement actions, Sub-section 4 is applicable only where (a) there is an adjudication that a patent has been infringed, (b) an accounting is ordered and (c) the adjudication of the patent infringement is final except for the accounting.

In other words, the situation might be if your Honor holds the patent valid and infringed, I would have a right of an immediate appeal to the Court of Appeals without going through any accounting proceedings or any other discussion in respect of recovery because if the Court of Appeals should reverse you in the event of your holding as I have just stated, why, we would be entitled to take an appeal immediately and seek a reversal and, of course, if the Court of Appeals reversed, why, then there, of course, would be no need for looking into any question of accounting damages or whatnot.

The Supreme Court has passed on the question and I have attached a copy of the decision in McCullough v. Kammerer Corporation, reported in 331 U.S. at page 96,

and I have marked the sections on-

The Court: What do you mean passed on the question? Passed on what question?

Mr. Taylor: On the question of the interpretation (156) of the statute and the right of an appeal immediately upon the finding of a Court as to validity of a patent.

The Court: I want to know if there is. Is there anything that says that this Court must handle the trial of a patent case in those two phases or is it a matter of discretion?

Mr. Taylor: I think from the practical—I don't have a case which delineates that just as you have phrased it, but I

call your attention to pages 98 and 99 of the decision of the Supreme Court which interprets the Act. I think some of the language here may be helpful.

I refer first on page 98, "The Act of February 28, 1927 provides that when any suit in equity for the infringement of letters patent for inventions, a decree is rendered which is final except for the ordering of accounting, an appeal may be taken from such decree to the Circuit Court of Appeals. The object of this 1927 amendment to the judicial code was to make sure that parties could take appeals in patent equity infringement suits without being compelled to await a final accounting.

"The reports of the Congressional Committees on the measure called attention to the large expenses frequently involved in such accountings and the losses incurred where recoveries were ultimately denied by reversal (157) of decrees on the merits."

Then at the top of page 99 they cite the Namm case and then they stated, "It was for this reason that Congress authorized departure in this type of case from the usual practice under which appeals are not allowed until rendition of a final judgment which disposes cf all phases of a controversy."

The Court: Mr. Taylor, I don't want to put you at a disadvantage.

If you were counting on the usual procedure and this is the usual procedure, I don't want to put you at a disadvantage, but I am just going to repeat what I said last night that this is an awfully old case and I just got into it very recently.

I am not sure it would even have been tried now if I had not activated it. It was sleeping soundly.

But a case of this age has to be disposed of and if the accounting that was involved in assessing damages, if there is going to be damages, if that were a very expensive complicated procedure, why, of course, I suppose it would be

practical to get the basic issues of liability determined and appeal if anybody is going to appeal.

But I have an idea that maybe it isn't so (158) complicated

here.

Assuming there is infringement, which I certainly don't know at this point, but if it is a matter of assessing how many of these garments were sold, I don't know why the damages are so complicated.

Another thing I have in mind is that unless it is very difficult and puts you at a great disadvantage to get these figures quickly, then it would seem to me it would help the Court and help the attorneys and everybody involved to have the whole picture before us.

What is the economic problem here? I repeat, I think it is important to know whether we are dealing with a million dollar problem or a five thousand dollar problem or what we

are dealing with.

It is possible, despite the protestations of all involved yesterday morning that this case might be settled and I think that the reason cases are not settled is because the attorneys and the Court do not know enough about the facts of their cases, and when they really find out what their cases involve and think them through then they decide very often that settlement is the lost thing that can be done.

Here is a case that people have not focused on sufficiently to even know what the economics of it are (159) and then that probably is the reason why you are not settling.

Mr. Taylor: May I say this, that there is more than meets the eye or the ear in this matter of accounting, because it would not only entail the determination which your Honor has in mind, but very importantly for my client Vanity Fair, a determination in the event that infringement and validity is found of what is a reasonable royalty.

This company has had no experience whatsoever in patent litigation which would call for a determination of

that problem, nor can I point to you any case in the garment industry because those patents have never been sustained, so we have had no—

The Court: That is a matter of expert testimony, I suppose. That is not a matter of immense costs of accounting. That is a problem of proof, there is no question about it. But what I can't understand, Mr. Taylor, to be perfectly frank, is why after five years there isn't preparation on this question of how many of these garments were sold and what the reasonable royalty would be. I don't understand it and I would be interested in knowing those facts as soon as possible.

We are taking time. I apologize to everybody (160) for being late this morning. I was trying to get an opinion finished that has to get out and then we have spent a little time arguing.

I want to go off the record for just a minute.

(Discussion off the record.)

Mr. White: Shall we resume the cross-examination, your Honor?

The Court: Yes.

GROVER H. LANDS, resumed:

Mr. White: Your Honor, I don't want to waste the Court's time with this unless the Court feels that there was something the least bit out of the ordinary in regard to the production of shall I call it the genuine Maidenform, because I have the chronology. There was an offer to make a stipulation—

The Court: I don't want to go into that any more. Let us go ahead and get the necessary proof in the case and make the most of it.

Mr. White: I just don't like it to be suggested that we have been doing anything wrong.

Cross Examination (continued)

By Mr. White:

Q. Mr. Lands, you do recall yesterday admitting on deposition you did testify that you were aware that the (161) 40-6 garment was not successful? You recalled testifying to that effect yesterday? A. To that effect, yes, sir.

Q. Then you went on to recapitulate and discussing a question about needing a new garment within a certain

family. A. Yes, sir.

Q. And that was, as you put it, the origin of Vanity Fair's adoption of the infringing garment? A. Yes, sir.

Q. I want to ask you whether or not you gave the following testimony on that subject on deposition.

You said, and this is on page 31, "Our interest was in tracking 41-28 as closely as was possible as a merchandising concept."

Now let me interpolate that that was essentially what you were explaining to his Honor at the conclusion of yesterday's session, was it not? A. What I was attempt-

ing to do, yes, sir.

Q. Going on in this testimony:

"Q. The problem of leg binding was one that was foreseeable in attempting this tracking?"

The Court: I don't know what we are tracking. You are tracking what? 41-28?

(162) Mr. White: It would save time if you would let me summarize what the witness said.

Your Honor, I was just getting into the question of how it came to be that the Vanity Fair Company

adopted the accused garment. The witness said: "Well, we had been making a series of garments having somewhat familiar designs with one another."

The Court: The Taper Mates-

Mr. White: The Taper Mates with a Keystone panel and that it was for that reason that the witness said, "We decided to adopt this garment."

I think this contradicts some testimony that he gave and rather than argue with him ad nauseam this morning I was just going to put it to him.

The Court: Can't we get some dates?

When were you marketing the Taper Mate line, including the 40-6?

Mr. White: That was not a Taper Mate, your Honor.

The Witness: The 40-6 was not in the Taper Mate family, your Honor, it was in a different family, and we ceased to market the 40-6, I believe, in either spring or fall and we can verify that.

Q. 1964? (163) A. We launched it in 1964 and cancelled it in 1967.

The Court: Is that Plaintiff's Exhibit 26?

Mr. White: 26 is 40-6, your Honor. It says 31-6, but the witness explained they changed the number.

The Court: All right.

Was that part of the Taper Mate?

The Witness: No, sir.

Mr. White: I would like to mark this document as Defendant's Exhibit B.

(Defendant's Exhibit B was marked for identification.)

The Court: The Taper Mate was the-

The Witness: It was a family launched, I believe, in 1967 that led to the development of the brief in question, 40-28.

Mr. Taylor: If the Court please, you will recall at the outset when I was offering exhibits you stopped me just short of the presentation of the Vanity Fair catalogs.

The Court: We are going to get them in.

Mr. Taylor: May I put those in front of Mr. Lands so we can have some definite reference to dates along the history line that you have mentioned this morning and he can pick it all out—

(164) Mr. White: I will bring it all out and do it quickly.

The Court: Mr. White says he will bring it out and the witness can look at the catalogs to the extent he may use it.

Mr. Taylor: May I put them up there so he can have them readily available in case he wishes to use them?

The Court: You can put them anywhere you wish.

Q. Mr. Lands, Exhibit 26—may we have it, please? Do you recall what it is? A. Yes, sir.

Q. Exhibit 26 was Vanity Fair's panty brief that preceded the 40-28, namely, Exhibit 26? A. One of the briefs that preceded it.

Q. It was the most recently designed precedent, was it not? A. There had been another one, 40-50 that came out in 1965 following the 40-6 in 1964.

Mr. White: I will ask that this document be identified as Defendant's Exhibit C.

Mr. Taylor: No objection.

(Defendant's Exhibit C marked for identification.)

Q. Would you explain to the Court what Exhibit B (165) is, Mr. Lands? A. It is a photostat of one of the pages in Vanity Fair catalog apparently spring 1964 from the way you have it noted here.

Q. Does that refresh your recollection when it was that the company introduced the 40-6 garment, which is Exhibit 26? A. It is my recollection it was the spring of 1964 and

this would verify it.

Q. Do you now recall when it was that that garment was dropped? A. Memory says it was dropped in 1967. I am not sure whether it was spring or fall 1967.

Q. And that was the year that the accused garment, Exhibit 23, was added to the line, isn't that correct? A.

Yes, sir, that is correct.

We also dropped 40-50 at the same time, I believe, that was introduced in 1965, in 1967.

Mr. White: I offer in exidence Exhibit B. Mr. Taylor: No objection.

(Defendant's Exhibit B received in evidence.)

The Court: B is a page from the Vanity Fair Spring 1964 Catalog?

The Witness: Yes, sir.

(166) Mr. White: It shows Exhibit 26, your Honor.

The Court: You are telling me that 40-6 model, Plaintiff's Exhibit 26, was introduced in the spring of 1964?

The Witness: Yes, sir.

The Court: It was dropped some time in 1967? The Witness: Either spring or fall and we can verify that. He may have already verified it here. I am not sure

Q. It was apparently in the Fall 1967 Catalog? A. If it was in the fall, then it was dropped that fall subsequent, because if we look at Spring 1968 I would venture to say it is not in our catalog.

Q. Why don't you verify that?

Mr. White: In the meantime, I offer in evidence Exhibit C.

Mr. Taylor: No objection. The Court: All right.

(Defendant's Exhibit C received in evidence.)

Mr. White: I might, while the witness is looking, point out to the Court in Exhibit C that that is the first instance of inclusion of the Exhibit 23, which is, of course, 40-28.

I would ask the Court, while he is looking at (167) that exhibit to read the statement that—in that catalog opposite 40-28.

A. We dropped 40-6 and 40-50 in the fall of 1967, introduced 40-28 at the same time.

The Court: What was 40-50?

Mr. White: That is shown on Exhibit C, your Honor.

The Court: Yes, but I don't think we have had any testimony about it.

Mr. White: I don't even think there is one in evidence or marked.

The Court: Yes, there is.

The Witness: There is. It was attempted to be put in.

The Court: Exhibit 27.

Mr. White: As Exhibit 27 received?

The Court: Yes.

The Witness: 40-50 was introduced in the fall of 1965.

The Court: What role did it play?

The Witness: It was, again, an extension of an existing family whereby we extended the panty girdle and girdle classification to include a brief.

Q. Just to make it absolutely clear, Mr. Lands, (168) it is true, is it not, that when you speak of families you are talking strictly of ornamentation or appearance, not function? A. In many cases absolute function, yes, sir.

Q. I am not really trying to set you up with that question,

Mr. Lands. I wanted to edify the Court.

Explain to the Court what you mean by family. A. Can

I show him a picture?

Q. Certainly. A. When we refer to a family of garments they are all essentially of the same basic styling and design concept and function insofar as each one is styled for its own usage.

We have in this particular case in the Taper Mate family 51-28, which is an open bottom girdle; 41-28, which is a long-legged panty girdle; 41-29, which is a shorter width and elasticized garter with hosiery snugging up; we have 40-29, which is a brief that has extensions off the sides above the natural waste line to trim in the waist; we have 42-28, which is a high rise garment coming above the natural waste to give a definition to the waste.

The Court: I think I got the point.

The Witness: And also 40-28, which is the brief

in question that was mentioned originally.

(169) The Court: We have talked about 40-6 and 40-50 as two of the garments that preceded 40-28, right?

The Witness: Yes, sir.

The Court: Why do you single out 40-6 and 40-50? Were they the only regular briefs that you had on the market prior to 40-28?

The Witness: No, sir.

Counsel brought up 40-6 so we were discussing that at his request.

I brought in the inclusion of 40-50 merely to point out that we had other garments on the market that were discontinued coincidental with 40-6 prior to bringing out 40-28.

However, your Honor, we did continue with other briefs in our line that had been in our line previously. One which started out as 31-1, which became 40-1, had been in our line since 1961 and was not dropped until 1969, which is approximately the same time that we dropped the brief in question, the 40-28, so it stayed in our line those years.

The Court: 40-6 has a panel, right?

The Witness: Yes, sir.

The Court: Was this the only brief you had with

a panel prior to 40-28?

(170) The Witness: No, sir. We had 40-83, we had 40-2, which had an inset panel over tricot which is illustrated on this particular page; we had a 40-56, which I can go back in other books and pick up where we had a brief classification with a panel as you see in this particular styling.

We have had through the years numerous briefs in our line. Some stayed short, some lasted quite a

number of years.

Mr. White: The 31.1 that the witness just talked about, your Honer, is the left-hand one in Exhibit B. That has no panel.

May I at this point, your Honor, confront the witness with his deposition as I had begun to do?

The Court: Yes.

Q. "Q. The problem of leg binding was one that was foreseeable in attempting this tracking? A. In brief, that would be one of the biggest negatives, has been the leg opening."

The Court: What garment are you talking about now?

Mr. White: Your Honor, this goes back.

"Q. Where did you get or did you acquire from your conversations with these buyers ideas for the cut of the style 40-21 as it eventually was attained? (171) A. Well, that was primarily a designer's"—

The Court: Mr. White, you want me to understand this case, don't you?

Mr. White: Your Honor, if I don't, I might as well go back to Maine.

The Court: This man, if he was around and had any participation in the development of these garments, it is obviously a proper and essential matter of questioning, but couldn't you, before you go back and forth in that deposition, simply ask him directly what Vanity Fair did to develop 40-28 and get the whole story out?

I think you can get it in bits and pieces through the deposition, but it is not going to mean much to me.

If he contradicts what he said in the deposition, then read the deposition, but let us get the direct testimony of what this man knows about the development of the infringing garment or the alleged infringing garment step by step.

Q. Mr. Lands, isn't it a fact that 40-6 was not successful? A. It was not successful in a very broad—

Mr. White: Your Honor, I am not going to be able to do it if he is going to start arguing with me. That is the whole point.

(172) A. I can't say yes or no.

Q. Go ahead now. A. You are asking for a conclusion yes or no and it cannot be answered as a yes or no, Mr. White.

The Court: We have already covered that. We have covered 40-6.

Q. Step two, therefore, Vanity Fair decided to design a new one that would be successful, isn't that true? A. We are always looking for new successful garments, yes, sir.

Q. And that garment was designed and was, in fact, added to the line as 40-28, isn't that true? A. Yes, sir.

Q. And that garment was successful, was it not? A. Yes, sir, it was moderately successful.

Q. I have one thing more to say, and that is, isn't it a fact when you designed 40-28 as a substitute for 40-6, you knew that Olga had been selling her 446 garment? A. I don't think that was ever taken into consideration in the design principle.

Q. No, that is not the question. That isn't the question.

Mr. White: Would you read it back, please? (Record read.)

(173) Q. Yes or no? I thing that is a fair thing to call for there. A. We were aware of it, yes, sir.

Q. And isn't it also a fact that Mrs. Reardon had seen that Olga garment at the time that she designed it? A. I

have no way of answering what Mrs. Reardon had or had not seen.

The Court: Couldn't we take it one step at a time?

You have got to realize I don't have five years' background on this. I don't know who designed what in Vanity Fair. I don't know what they did.

Couldn't you ask the witness what happened and just take it one step at a time?

Who designed it? What material did they get? What did they do to design it? What was the basis for their design? What alternatives?

Those are subjects you bring out in your brief and I thought you would have testimony on them and you are not bringing it out.

Can I have a copy of your brief?

Mr. White: Do you mean the findings or the brief?

I am just cross-examining this one witness, your (174) Honor, and I absolutely refuse to ask him non-leading questions after the way he testified yesterday.

Let Mr. Taylor bring it out if he wants and then I will cross-examine.

I am asking him questions that I know I can hold him to because I have got him on a deposition.

The Court: You have in your brief on pages 9 and 10 kind of an outline statement of what you claim was the development by plaintiff of its infringing garment.

You have a discussion of the commercial disappointment with the non-infringing panty girdle, the demands from sales department for a garment with more control, the design of the accused garment, you

have a quotation from a deposition, where the garment was considered an Olga garment, one of the better functioning briefs in the trade and with certain functions that people considered desirable. You tell me after considering over six other candidates plaintiff chose the accused garment.

These are things you proposed in your trial brief

to prove to me.

I don't mean to interfere with the order of the proof, but those are things that aroused interest in me from your brief.

Are you going to prove them through this witness (175) or are you going to prove them through another witness?

How are you going to prove them?

Mr. White: I am going to prove them through Mr. Hoopes, your Honor, but I have him on his deposition with some tidbits I want to put in the record, but I don't have to do it—to ask him—to let him launch into a long diversionary spiel. I don't want to do it that way.

The Court: All right, you stick with your tidbits. Mr. White: What was the last question, please? I will continue.

Q. You say you don't know if Mrs. Reardon designed the garment? Was that your testimony? A. No, sir. You asked a question whether or not she was aware of the Olga

garment in question and I told you I did not know.

Q. Wasn't the 40-28 garment specifically requested by Mr. Hoopes or his committee? A. I was part of Mr. Hoopes' committee at that time, Mr. White. The basic concept, the basic request for that garment came two-fold. It came from the sales department and from a fashion forecast of where the silhouette or outer ready-to-wear picture was going.

Up to this time it had been in a chemise or an (176) A-line type concept, loose to the waist and such, but we were told at that time and it was starting to come on to the scene a closer to the body fitted outer silhouette which demanded tighter, better control, better-defined waist and that was one of the reasons we chose to go with the 40-28 concept, because, again, we were trying to expand families of which we had the Taper Mate family.

We brought that out in answer to this more defined waist with the belted look or closer to the body look and we ex-

panded it with the 40-28.

Q. Is it not a fact that the reason you designed 40-28 as a substitute for 40-6 was to increase the tummy control and to make the leg openings more comfortable? A. We brought it out two-fold; one, to give a better control to the abdomen, yes; two, to track it with an existing family, the Taper Mate family.

Q. Do you deny that you also did it to make the legs more comfortable? A. We think that in the execution, our execution of the garment, which is substantially different than the Olga garment, that we made a very superior garment to the ones that we had had in the line prior to that, yes, sir.

The Court: Mr. Lands, you limit your answers to Mr. White's question.

(177) The Witness: Yes, sir.

The Court: Your counsel will have an opportunity to redirect you to bring anything out in addition, but we are going to speed this trial and we can prevent Mr. White from being apprehensive about your testimony if you limit yourself to his question.

We don't have to have speeches about Olga's garment being different from your garment.

Just answer his question. All right?

The Witness: I will do the best I can, your Honor.

Q. Do you deny that one deficiency in 40-6 was that it was not comfortable around the wearer's legs? A. I deny that.

Q. Do you deny that 40-28 was designed the way that it was designed in order to alleviate that problem? A. It did alleviate that. That was certainly one of the considera-

tions, of keeping a free leg, yes, sir.

Q. And isn't it a fact that your 40-28 style has been one of your best selling briefs during the period of time after its introduction and, in fact, had been bigger than any other single brief during its time? A. It was one of our better briefs. It was not the (178) largest selling brief that we have had in our line.

Q. Were you asked the following question on your deposition and did you make the following answers on page 32:

"Q. How has the 40-28 style performed in this regard?—meaning leg comfort. A. It has been our best-selling brief during the period of time. It's been bigger than any other single brief during its time." A. During its time, yes, sir.

During the period of time that it was out, which at that time was two seasons, I believe, when the deposition was taken. It was taken, if memory serves me, in November 1968. We brought the garment out in either October or November 1967.

A season, your Honor, is approximately a six-month period since we break the year in two collections, two seasons.

Mr. White: That is all. You may inquire. The Court: Anything else, Mr. Taylor?

Mr. Taylor: Yes, I have.

Re-direct Examination by Mr. Taylor:

(179) Q. Mr. Lands, yesterday I believe you were questioned in respect of the garment P-24, which is the Vanity

Fair 40-28 garment with the stitching removed so as to permit the front panel to be laid down, so to speak, for ready inspection as to the structure of the garment.

Will you tell me whether or not the portion of the garment in Plaintiff's Exhibit 24 for identification which would remain after the complete removal of the panel is related to any prior brief of Vanity Fair? A. Yes, sir, it is, Mr. Taylor. We had designed garments of this general nature before, your Honor, where we had actually wrapped individual pieces of elastic around and criss-crossed them, overlapped them in the front of the garment, as we have done in this particular case.

The underlaying started here, wrapping around to the back seam, and wrapping around over the front and criss-crossing so that you get a double panel effect in the front of this garment, which is, in essence, the inclusion of a panel front abdomen control type garment.

When we set out to make a freer garment, a better garment, and each garment we make hopefully is made better than the one previously made, we started with this principle.

Obviously we put a tricot crotch in it for sanitary and comfort's sake.

(180) Then in order to make this garment track with the family of Taper Mates which had a Keystone type effect to it, we had only two choices. We could have stitched it across the single layer power net to have given it the same visual effect of the Taper Mate or we had to devise some panel overlay on this in order to achieve the same visual look so that we could put it in the same family.

It is just not practical to try to stitch across single layers of power net because you cut the elastic and when it is on the body then it starts to pop little holes or needle-cutting, so it is not practical and it would have been a very foolish direction for us to proceed.

So what we decided to do, rather than tracking it out on either side with the stitching that would have given it the

Taper Mate identity, we chose to take a third panel, which for all practical purposes is superfluous as far as fit and function is concerned because we already have two overlapping abdominal panels to do the controlling in the front working opposing to each other; what we did do was to take and overlay it with a third panel to achieve the design principle that would track with the Taper Mate family.

This in no way in our opinion added to or took away from

the garment, except to give it visual identity.

(181) The inclusion of a third panel in theory might give it a little more abdominal control, but it certainly is not abdominal control that was needed in this particular garment, because we had already achieved a perfectly natural fit and function.

Secondly, by the inclusion of the tricot crotch we felt by overlaying that portion we would have an esthetically better appearing garment and such. So that was the way that 40-28 was designed, developed and created.

The Court: Can I have Exhibit 23 and Exhibits 15 and 16.

Mr. Taylor: Yes (handing.)

The Court: Do I understand it Exhibit 16 is the Olga garment that was actually marketed? It combines the 301 and 300 patents, is that right?

Mr. Taylor: That is correct, yes, your Honor.

The Court: And 15 is a model that was made for purposes of litigation, but it was not something that was marketed?

Mr. Taylor: Except this, that Olga herself has admitted in her pretrial deposition that that is in exact accord with figures 1, 2, 3 and 4.

The Court: As far as what was marketed-

Mr. White: Exhibit 16.

(182) The Court: All right.

You are telling me that the alleged infringing garment has two panels, in effect, right?

The Witness: Yes, sir.

The Court: Your answers to Mr. Taylor in the last answer really went a little fast for me and I am not sure I understood.

You were trying to say or tell us the purpose of the thinking that went into the design of this Vanity Fair garment, is that correct?

The Witness: 40-28, yes, sir. I was trying to stepby-step follow our thinking and our reasonings behind the development of it.

The Court: Who actually did the design? Was it you, was it a committee, was it Mrs. Reardon? Who did the design?

The Witness: Mrs. Reardon was charged with responsibility of giving us a brief that would track with the 41-28 or the 28 family, the Taper Mate family, and she was at liberty to execute in whatever way she saw fit at that time.

She started out and there were changes, modifications, slight modifications made as we went along.

The Court: Who gave Mrs. Reardon her directions?

(183) The Witness: Mr. Hoopes, who was in charge of the committee that designated the styles that were to go in.

I in turn-

The Court: You start with a committee?

The Witness: Yes, sir, headed by Mr. Donald Hoopes.

He gave us the total direction where we were going, where we were to go. I, in turn, transmitted that information primarily to Mrs. Reardon and worked with her in the development of the garment.

The Court: What objective did this committee decide it wanted to achieve?

The Witness: A firmer control at the top, firmer control brief to better control the waist since the waist line was coming back into vogue at that time after many years of absence and also—

The Court: Just a moment.

What time are we talking about, when this committee was having its considerations?

The Witness: It would have been late fall 1966, spring 1967.

The Court: What do you mean the waist line was coming back into vogue? A thin waist line?

(184) The Witness: As I was starting to mention earlier, your Honor, for several years the outer wear silhouette had been the so-called chemise or A-line, a very loose waist type garment and that had been the vogue in the ready-to-wear classification for a number of years so the women's need for a defined waist had not existed for several seasons prior to this.

But at this time the fashion cycle was starting to move and the clothes were coming closer to the body, the waist was reappearing even down to the belted look and such so the need became much more pronounced for us to have a garment in our line that would answer the need for this better definition of waist, control at the waist and such, as well as having the other components.

The Court: When you are talking about better you are talking about better than the 40-6?

The Witness: Yes, sir. The 40-6 had abdominal control, which had been the only thing that the consumer for all practical purposes—for several years, because of the chemise, the A-line look, the woman had not needed definition at the waist.

She had been aware of and insisted upon having some abdominal or referred to in the vernacular the tummy control. She was aware of the pulling in so she didn't (185) have the little pouch out. But as far as needing at the waist, there had not been any reason for—or the strong need.

The Court: The 40-6 did not have as strong abdominal and waist control as was necessary at that time?

The Witness: It had enough abdominal, sir, but not enough at the waist, in our opinion. We felt we needed more control around the waist.

The Court: What other objectives did your committee have?

The Witness: Well, that was the first charge, that we develop a garment of this nature that would answer this wide lastic top that would give better control for a definition of waist.

Secondly, as it always is in development, we were charged with responsibility with attempting to track it with an existing family, because it is very much easier to merchandise a product if you can tie it in with existing styles. You can merchandise them as a family, sell them as a group, each having its own need and fulfilling a specific function.

The Court: Did you have a family that you were trying to fit something into?

The Witness: Well, we were not necessarily (186) trying to fit it into, but the Taper Mate family existed and as we went along and we got the initial design concept on this it became apparent that if we could track it with the Taper Mate family we would be far ahead, so, yes, we attempted to track it with the Taper Mate group.

The Court: These are all things you probably

brought out, Mr. Taylor and Mr. White, but it went a little fast so I am going to go over it again.

Mr. Taylor: It is quite all right with me. I think it is very helpful.

The Court: On Exhibit 26, is that what you call a detachable garter?

The Witness: Yes, sir.

The Court: Could this garment be worn without garters?

The Witness: Yes, sir, it positively can.

The Court: It would not creep up?

The Witness: No, sir.

To my knowledge, no basic brief, panty brief, must be worn with garters. I know of none.

The garters are put on there as an accommodation to the consumer that if she chooses to wear it with stockings she has that availability.

They are really attachable garters rather than (187) detachable because for all practical purposes, it is sold to be worn as a brief to be worn garterless.

The Court: You gave me two objectives; one, firmer waist control and another, to fit something in an existing family.

What other objectives did you have or objections that you were trying to meet or whatever?

The Witness: Those were the two primary, obviously, to get a garment that would give us a higher rate of sale at the retail level.

The Court: The actual design was to be carried out by Mrs. Reardon initially, right?

The Witness: She was charged with responsibility to develop that particular style, yes, sir.

The Court: Did you convey the committee's objectives to her?

The Witness: Yes, sir, I did.

The Court: In the considerations that your committee went into, did you examine competing garments that were on the market?

The Witness: No, sir, not directly in any way.

The Court: Directly is-

The Witness: No, sir, we did not.

The Court: What did you mean by directly?

(188) The Witness: Well, we were aware of the merchandise that was available. When I say we, I mean I and others I presume in the committee. I was aware of certain styles that existed. That is part of our job, to stay abreast of competitive garments and where they are going, what's happening.

The Court: Does your company get samples of

competitive garments?

The Witness: We have on occasion, yes, sir.

The Court: Did you get the Olga garment at this time?

The Witness: We did not at that time. We have since purchased some when this litigation came up. At that time, to my knowledge, there had never been a single one purchased by Vanity Fair representatives.

The Court: Aside from purchased, at that time had you personally seen the Olga garment, that is, Exhibit 16, or something—

The Witness: I had seen ads on it, I had seen the

garment, yes, sir.

The Court: You had seen the garment?
The Witness: Yes, sir, I had seen it retail.

The Court: Where had you seen it? The Witness: In the retail stores.

(189) The Court: Had you examined it?

The Witness: Not directly, not intimately, no, sir.

The Court: Did you know the basic design of that garment, the features of it?

The Witness: I read in her ad what she claimed

for it, yes, sir.

The Court: But did you know the features of this garment?

The Witness: No, sir.

The Court: You did not know about the panels and the—

The Witness: I knew there was a panel in it, your Honor, that it overlayed, yes, sir, because I had seen the garment at retail level.

The Court: At the retail level you had seen it? The Witness: Yes, sir, I have seen the garment.

The Court: And you knew about the panels?

The Witness: Yes, sir. The Court: Or the panel.

Did you know about the crotch arrangement?

The Witness: I knew it had a crotch shield set into it, yes, sir.

The Court: And you had read the publicity of

(190) Olga about it?

The Witness: Yes, sir, I had seen, I believe, an ad that appeared in a trade journal. I don't know if it was an ad or publicity, I don't recall exactly, but I had seen this.

The Court: This may have been covered by Mr. White, but I will just go over it if I could once more. Was there any discussion in your committee about the Olga garment as such?

The Witness: No. sir.

The Court: Was there any discussion between you and Mrs. Reardon about the Olga garment as such? The Witness: Not to my knowledge, sir, no, sir. The Court: I am asking you about your discussions.

sion.

None that you had?

The Witness: I am saying to my knowledge I am not aware of any. I have no memory of any such discussion with her, no, sir.

I did, your Honor, explain to Mrs. Reardon a design principle that I thought she should look into before she proceeded and that was one of our other garments.

The Court: What was that?

The Witness: I believe I am right in telling you it was 41-83. I'd have to refer to my catalog on that (191) to make sure.

The Court: Let us get that.

The Witness: Do you have previous to 1964 catalogs?

Mr. Taylor: If you look at the catalogs they are all numbered. No. 1 is the earliest catalog that I have.

The Witness: It may have been prior to 1964. The Court: What generally was the type of de-

sign?

The Witness: It was an overlap design, your Honor, that wrapped from the back section around the derriere and criss crossed in the front and we designed a little heart-shaped panel which was wide at the top—

The Court: This was the criss crossing you de-

scribed to Mr. Taylor?

The Witness: Yes, sir.

The Court: That is one thing I didn't understand. Can you draw it or do something?

The Witness: I think I can physically illustrate

it here if you will follow it just a moment.

The other garment literally overlapped in front and we told her to look at that particular style and see how it would apply.

(192) The Court: You are talking about the— The Witness: If memory serves me, 41-83.

The Court: What were the principles again on that?

The Witness: It was a single layer in the back, it had a back seam with the individual quadrants wrapping around and under the derriere, across the hip and criss-crossing in front so that you had an overlapping effect, and that is the way she executed the basic frame of 40-28.

The Court: As it turned out, it is not criss-crossed?

The Witness: Yes, sir, it is.

The Court: Is it?

The Witness: Yes, sir. You have a tri-panel here. You have three layers through from here to here and they are visually illustrated here, your Honor.

If you will note that the underneath portion is stitched at this point going across to the back seam, you notice it is stitched here, then the back seam there is another portion that comes across that overlays this and comes across and is stitched at the other side, so that you literally have a double panel, wide at the top in the abdominal section attached to a tricot crotch for comfort and sanitation.

(193) The Court: I just have to go a little slower. You are saying that the criss-crossing created a double panel in the front?

The Witness: Yes, sir.

The Court: Does that have the same effect as if we took a piece of material that was not criss-crossed and then stitched a panel on top of it?

The Witness: It is in my opinion even superior, sir, because each of these quadrants then are pulling

against each other. They are trying to come apart.

The Court: What do you mean a quadrant?

The Witness: Each quadrant—I don't know exactly how I phrased it.

The Court: You are talking about the word quad-

rant. I don't understand you.

The Witness: I think a quadrant is approximately

a quarter of the entire garment and such.

Each of these overlayed portions are pulling one against the other. This underlay portion is pulling this way from this point around the body, around the hips, the hips working and putting tension on it, the overlayed portion is pulling opposite across so that they are competing with each other across the abdomen, one pulling against the other.

(194) This garment is pulling from this point across the abdomen; the other is pulling from this point across the abdomen. When you get it on a body and the hips start to work it, it tensions it out and puts substantial tension across the abdominal

section.

You get at least the equivalent of an overlayed panel and, in our opinion, you get more control than if you would to simply overlay it with an existing piece of self-fabric powernet.

The Court: It was this that was intended to give

the flattening, right?

The Witness: That was her interpretation of it,

yes, sir.

The Court: You are the fellow on the committee. When you looked at it and you approved it, was that your belief?

The Witness: Yes, sir. I had asked her to refer

to this 40-83 which had the same basic design.

The Court: The panel that went over this which

is attached to Exhibit 24, please tell me again what was the purpose of that?

The Witness: It was an attempt to track it with the Taper Mate family by design.

The Court: Where is a picture of the Taper Mate (195) family?

The Witness: We have the garments here, your Honor.

The Court: Can't we just use the pictures? I think you had the whole group here a minute ago.

The Witness: Yes, we can.

The others were never allowed into evidence, if memory serves me.

Mr. White: I will withdraw my objection. The Court: We will take care of that.

The Witness: The garments exist here if you would like to physically see the garments. I think you might, though.

Mr. White: Here is a page with a lot of them on it.

The Court: For my purposes, the catalog is perfectly fine.

Mr. White: Isn't that right in front of his Honor? The Witness: Yes, sir. We had a broader base of them in another catalog I was looking for.

The Court: What is the feature of the Taper Mate which you were trying to fit this into?

The Witness: The styling concept, the Keystone (196) concept; wide at the top coming out with side panels coming down to the crotch area.

The Court: Keystone front, right?

The Witness: That was our terminology for it being a Pennsylvania firm and Keystone being—

The Court: You are telling me that this panel was put on purely to have a Keystone design?

The Witness: In an attempt to track it with the Taper Mate family and also, incidentally, to cover up what we considered to be less than a visually pretty crotch.

The Court: In other words, it was purely visual?
The Witness: For all practical purposes, yes, sir.
The Court: As far as you were concerned, it had no abdominal flattening, no structural function?

The Witness: It may add fractionally to it, but it was not necessary to make it essentially a func-

tioning element.

Had it been possible, your Honor, as I mentioned earlier, to come in here with stitching to visually stitch it here and giving this effect and we considered it and attempted it, but when the stitching goes through single layer powernet you have a very big problem.

We could have stitched it then where we have

an overlay here when it got out here.

(197) The Court: But that would have hurt your structure?

The Witness: It is impractical, sir, because you would have needle-cut it and cut holes in it and it would not have been a commercial garment.

Mr. White: Could I interrupt?

The Court: Yes.

Mr. White: How about these other Taper Mate things, how were these Keystone appearances achieved?

The Witness: We have the garment.

Mr. White: Let us get it up here. Mr. Taylor: We have it right here.

Mr. White: Is that a single layer powernet on these other garments?

The Witness: It is an underlayed powernet panel, yes, sir.

Mr. White: We are talking about how you could not simply make some stitched line or put this panel on there and anchor it, as I understand it, because it would have hurt the garment.

The Witness: We could not have come out here in single layer powernet.

Mr. White: All I want to know is did you do that in those other garments?

(198) The Witness: No, sir, we did not.

The Court: Let us see the garments.

The Witness: The garments exist if you would like to look at them.

Mr. Taylor: I don't know the numbers. You will have to pick them out.

Mr. White: I guess we ought to identify them. Are they identified with the exhibit numbers?

Mr. Taylor: The exhibit numbers are on them, I think.

Mr. White: Why don't we put them in evidence? The Court: Could one of you offer the catalog, if you would.

Mr. Taylor: I will offer it.

The Court: Then the Keystone garments that Mr. White has just referred to, I think all of that would be helpful.

Mr. Taylor: I think if your Honor had the garments marked for identification, I would like to offer those.

The Court: We will start with the catalog. Who is going to offer the catalog?

Mr. Taylor: Yes, I would like to offer that catalog as Plaintiff's Exhibit 36.

(199) Mr. White: No objection.

(Plaintiff's Exhibit 36 received in evidence.)

Mr. Taylor: I might identify that as the fall and winter 1968.

Mr. White: One will do, unless there is a difference between them.

The Court: I think they have the same stitching. The Witness: The same basic paneling. It was possible to do it in these garments. Unfortunately, it was not practical to do it in the brief form.

Mr. White: Why don't I withdraw my objection to it?

The Court: Plaintiff's Exhibit 29 is received.

(Plaintiff's Exhibit 29 received in evidence.)

The Court: What is 29? Is that a panty? The Witness: It is a panty girdle 41-28.

Mr. White: Was it designed before or after Exhibit 23?

The Witness: Before.

The Court: Does not that have the ornamental stitching?

The Witness: No, sir. The ornamentation of the stitching is incidental to it. If you kind of X-ray through you will see that it has powernet behind each of (200) the stitching areas.

The Court: It has panels?

The Witness: Yes, sir, behind each and every portion of it.

Mr. White: I am pointing out that clearly some of that stitching is going through an overlying panel in an underlying—

The Witness: It is not going through a single layer, Mr. White, and that was my comment, sir.

Mr. White: Have I lost the testimony, your Honor? I thought the question was why this couldn't have been stitched in here like this garment.

The Court: I think that he was saying that in order to create the Keystone design you could not just have stitching in the single layer of whatever it is.

The Witness: Powernet, your Honor.

The Court: Right?

The Witness: Your assumption is correct.

Mr. White: I say it is a non-sequitur because Exhibit 29, which he says he was tracking, does not just rely on visual stitching but puts a panel on there and stitches it through the underlying one.

The Witness: Mr. White, I explained our attempt to design this other garment started with an overlayed under (201) panel and you cannot—there is no way that I know nor any design principle that I know of where you can wrap this garment around and at the same time create this design.

Believe me, we tried and tried at great length to accomplish that but unsuccessfully.

The Court: Isn't it correct, Mr. Lands, that you wanted—let us go back.

We had the 40-6 garment, right?

Mr. White: That is this one, your Honor.

The Court: That had a small panel. It was not maybe Keystone, but it was a small panel.

The Witness: An abdominal overlay panel, yes.

The Court: You wanted a bigger panel, right?

The Witness: Right. Yes, sir.

The Court: And that bigger panel was not compatible with the Keystone design, right? That is, in effect, what happened?

The Witness: Yes, sir.

The Court: So you got your bigger panel and then in order to create the Keystone design you had to have some form of ornament?

The Witness: Yes, sir.

The Court: And you did it in the form of a new

panel?

(202) The Witness: Of a third overlaid panel, which was in keeping with the concept of the Taper Mate because the Taper Mate has a tri-panel in it.

You will note you have the body of the garment, the first panel and the second overlay panel which makes it a tri-panel throughout the entire area here, here, here.

Mr. White: And I think it is a fair question to ask you why if you were just interested in making a garment with a wide panel at the top that would track this you didn't do so?

The Witness: Mr. White, I don't know how much

you know about designing girdles, but-

The Court: Just a moment. It is a fair question. We are all interested in knowing what the considerations were that went into this design, but just don't argue with Mr. White. He is asking questions, I am asking questions, and just give your answers.

The Witness: It could not be executed in a compatible way so that it was functional on the body in a saleable manner.

The Court: Is this correct, the Keystone narrows at the top? The Keystone is—that is the point of Mr. White's question.

Mr. White: Yes, exactly the point. I am quite (203) content with the answer you gave.

The Witness: I am saying the Keystone was our working name for this because we felt it had the appearance of a keystone and tracked a keystone, your Honor. We didn't name it Keystone, your Honor. We named it Taper Mate.

The Court: Let us see these designs.

The Witness: We did achieve in this-

The Court: Where is the catalog?

The design basically has a V running from the crotch and widening out, right?

The Witness: Yes, sir, it does.

The Court: And then it also has a keystone which starts in the middle of the top and goes out so it has these dual figures overlaid?

The Witness: Yes, sir. You have the waist control plus the abdominal control achieved in the same

garment.

The Court: By the two types of panels, what I will call the V panel and what I will call the keystone panel.

The Witness: Yes, sir.

The Court: They are both control features, are they not?

(204) The Witness: Yes, sir, they are.

The Court: And we are talking about the other models in this Taper Mate group, right?

The Witness: Yes, sir.

The Court: And that is true of the other models beside 40-28? That is true in Exhibit 29?

The Witness: 29.

The Court: What I am still puzzled about and I think it is of some importance is, in the panty girdle the V form panel and the keystone form panel were both control features, right?

The Witness: Correct, sir.

The Court: You come along in the alleged infringing garment, which is Exhibit 23, and you have again a V element here and you have got a keystone element, right?

The Witness: Yes, sir.

The Court: Are you telling me that the keystone is purely ornamental in Exhibit 23 when it is not ornamental in Exhibit 29? I don't understand that.

The Witness: No, sir, I am not saying it is purely that. I explained to you that the third panel does add some abdominal control. We felt that we had a certainly compatible basic relief without the overlay on that, but in an attempt to track it with a family by the inclusion of the third (205) panel in it we could achieve our design principle and track it with the Taper Mate family, sir.

The Court: But the overlay panel, the keystone panel, has some abdominal control, right?

The Witness: Yes, it does.

The Court: Let us take a short recess.

(Recess.)

The Court: On the Vanity Fair garment, was there to be a strengthening produced by one or both of the crotch pieces?

The Witness: Only one crotch piece, your Honor, will ever actually work. Whichever one works to its shortest extension is the one that dominates.

The Court: In other words, if one is loose and one is tight, the tight one is the only one that is going to do anything?

The Witness: Unless it happens to be a rigid fabric, which this is not, it is tricot fabrics; but when it goes to its extension, that is the maximum that this portion can ever work.

The powernet can work at a greater distinction than the tricot crotch, your Honor.

The Court: You tell me which of these would operate with any force. Would it be the inside?

(206) The Witness: On this particular case it is the inside because tricot has less extension poten-

tial than does the powernet, so when it comes to its maximum length it then becomes a rigid fabric and has a constriction.

The powernet has the ability to stretch even beyond that with the body able to work it.

The Court: The crotch piece here looks as if it

is purposely made looser, though.

The Witness: Your Honor, I don't know that particular garment. It possibly was from a comfort standpoint. This was a hand sample, not a production run. I will have to go back and check the physical components to see how the pattern was actually made.

The Court: Is this something we don't have the actual commercial model of?

Mr. Taylor: I don't know.

The Witness: It is in the courtroom. This is not it, but it certainly is representative of it.

The tricot crotch, your Honor, may have been made—and I can't verify exactly for this—the designer may have given a little extra play so it would work because it does have a restriction built into it. It has a very limited amount of stretch, the actual tricot itself, so she may have given a little extra room so it might extend (207) a little further for a comfortable fit.

The Court: Isn't it possible that that inside was really to be for comfort and sanitary question?

The Witness: By and large that is why you use tricot next to the body.

The Court: And the ouside was the one that was supposed to exert the pull and whatever flattening effect?

The Witness: I think generally it physically does in this particular case, yes, your Honor.

The Court: On this garment?

The Witness: Yes, sir.

However, the garment, your Honor, without the paneling in it would have had the same control because of the extension of the tricot inset.

The Court: Does anybody have anything else for Mr. Lands?

Mr. White: Yes.

Not from him, but would your Honor kindly look now at Exhibit C?

The Court: Yes.

Mr. White: Would your Honor read once again what it says under 40-28?

I want to ask the witness something about that text.

(208) By Mr. White:

Q. Is not the free powernet-

The Court: You ought to make sure he has a copy.

Q. Do you have it in front of you? A. I am reading it.

Q. Is not the "free powernet panel" near the end of that text the element in Exhibit 24 which has been unsewn? A. Your question again? I'm sorry.

Mr. White: Would you read it, please? (Question read.)

A. The powernet panel in Exhibit 24 is unsewn. I didn't understand beyond that your question, Mr. White.

Mr. White: May it be read once more? The Witness: Do you want to rephrase it?

The Court: Read the question. He didn't understand it.

(Question read.)

A. Yes.

Q. You were present when Mrs. Reardon gave her deposition in this case, were you not? A. Yes.

Mr. White: Your Honor, I am stymied. Unless I can cross-examine this witness about some testimony that (209) Mrs. Reardon gave, I have got to have her recalled.

The Court: She can be recalled.

Mr. White: All right.

Would you please recall Mrs. Reardon?

Mr. Taylor: I don't know. I had to have a babysitter for her to come Monday. I don't know what the family situation is, but this noon I will make every effort.

Mr. White: May I read into evidence part of her deposition?

Mr. Taylor: Why don't you just read the deposition and I will have no objection to it being read just like you would ordinarily read a deposition when the witness is not here.

The Court: Mr. White, I think, has a right to read the deposition and I think if he still needs to have Mrs. Reardon recalled, if she is the one that designed the garment, I would require her back.

Mr. White: Why don't I just read it and see.

The Court: It is up to you. Mr. White: I will do so.

The Court: All right.

Are we finished with Mr. Lands?

Mr. White: I have no more.

Mr. Taylor: Are you going to read the testimony (210) now or later?

Mr. White: After we are through with Mr. Lands. Mr. Taylor: I would like to have this testimony in the nature of a recall of Mr. Lands because I am going to touch upon the discontinuance of the 40-28 in whatever year Mr. Lands will now say and also to introduce the new brief of the Vanity Fair which is illustrated in the catalogs Plaintiff's Exhibits 33 and 34.

The Court: So you have further redirect for Mr. Lands, right?

Mr. Taylor: Yes.

I haven't any redirect, but I would like to recall him now to talk about a different subject, which is the placing upon the market by Vanity Fair of this brief, which is now marked 35 for identification, and which is referred to in the catalogs.

The Court: You can go ahead and question him. I will permit you to question him.

Direct Examination by Mr. Taylor:

- Q. Mr. Lands, will you again state the approximate year or date when the 40-28 was discontinued by Vanity Fair? A. The fall of 1969.
- (211) Q. And that meant that it had been on the market by Vanity Fair from when? A. The fall of 1967 to the fall of 1969, four seasons.
- Q. I believed you referred to a prior brief that had an eight-year history with Vanity Fair, did you not? A. 31-1 or 40-1. It was known by both numbers.

The Court: That was on the market how long? The Witness: From 1961 to 1969.

Q. Are there any other briefs that you can recall that were on the market for more than two years which had been manufactured and sold by Vanity Fair? A. Yes, sir, the 40-50 was on two years, the 40-6 was on in excess of that. It was on three years.

Q. Mr. Lands, I show you a garment which is here identified as Plaintiff's Exhibit 35 for identification, and I will ask you to state what it is. A. It is our panty brief 40-30,

known as the peddle brief.

Q. And that has been on the market from when? A. I'd have to refer to this. Memory tells me it was 1972, but I can't tell you for sure.

Q. You are now going to refer to the catalogs, Plaintiff's Exhibits 33 and 34? (212) A. 33 and 34, if I may, sir.

It was introduced as a new style in the spring of 1972 and it is currently being marketed.

Q. What relation, if any, does this garment, Plaintiff's Exhibit 35 for identification, bear to the Vanity Fair garment 40-28, Plaintiff's Exhibit 15? A. Very little, other than the fact it has a reinforced front panel, tricot crotch, I believe.

I'm sorry, it is the new one that we put the tricot crotch. I am confused on that. I'm sorry.

The Court: The question was about what relation Exhibit 35, which is a new Vanity Fair garment, bears to Exhibit 15, which is a garment which Olga never marketed?

Mr. Taylor: That is correct.

I am merely asking for a structural definition and description, that's all.

The Court: Is there any claim that Exhibit 35 is infringing?

Mr. White: No, your Honor.

Mr. Taylor: I now offer in evidence the garment Plaintiff's Exhibit 35 for identification.

Mr. White: Objected to as irrelevant and immaterial.

The Court: What is the relevance?

(213) Mr. Taylor: Because I think we ought to have, if your Honor is interested in the history of this brief manufacturing and sale by Vanity Fair, what happened after the discontinuance of the 40-28 or Exhibit 15 or the other garment which is the double crotch arrangement.

I am going to ask that question.

The Court: As I understand it, the Vanity Fair alleged infringing garment went off the market in the fall of 1969.

Here you have another garment which was the peddle brief which comes out in the spring of 1972.

The Witness: We had additional briefs that came out subsequent to that.

The Court: I don't think it even helps on that subject; what happened after the alleged infringing garment.

The Witness: Chronologically, when we closed out the 40-28 garment in the fall of 1969, we came immediately in the spring of 1970 with three new offerings in a brief category and have subsequent to that offered three additional briefs.

The Court: I will sustain the objection to 35.

Q. Will you point to the catalog that illustrates the development and offering by Vanity Fair of the briefs to which I referred?

(214) Mr. White: Objected to, your Honor. On the same grounds.

The Court: You are talking about garments that were introduced immediately after the 40-28 was discontinued?

The Witness: Yes, sir. The same as we closed out 40-6 and 40-50 in the fall of 1967 and introduced 40-28, we subsequently closed out 40-28 in the fall of 1969 and reintroduced three additional styles in the spring of 1970, your Honor.

The Court: I will allow that.

The Witness: That would be shown in Exhibit 33.

Q. At what page? A. Pages 12 and 13.

The Court: You are directing me to-

The Witness: I am telling you subsequent developments in our brief classification following the demise of 40-28.

The Court: This is on Exhibit 33 pages 12 and 13. What model numbers?

The Witness: 40-81, 45-85 and 45-83. The 83 classification I referred to earlier in there is obviously wrong, because this is the 83, the overlap, but I couldn't verify that one further.

Q. Mr. Lands, will you direct your attention to (215) Plaintiff's Exhibit 34 and point out, if you will, the briefs which are offered beginning with the spring and summer of 1972?

The Court: Why do we have to get into 1972?

Mr. Taylor: I am only trying to give you the continuity since your Honor was so interested in the development and the existence of the art as to manufacture and sale of Vanity Fair, I thought it would be wise to bring it right down to date.

The Court: I don't see it. I think the important development is the development that led up to the design of the infringing garment and then we have the facts about how long it was on the market, the

facts about its discontinuance and what immediately came after.

Unless I am missing something, I think that is all we need.

Mr. Taylor: Don't you think that the subsequent history and the fact that there is no charge of infringement made by the Olga Company in respect of any of these garments which succeeded the 40-28 is the finishing evidence with respect to—

The Court: I take it Mr. White would stipulate that there is no claim of infringement as to any garment except 40-28.

(216) Isn't that right, Mr. White?

Mr. White: So stipulated.

The Court: All right, that takes care of that.

What is next?

Mr. Taylor: I have no further questions of this witness.

The Court: Do you have any further questions?

Mr. White: No further questions.

The Court: All right, Mr. Lands, you are excused.

(Witness excused.)

Mr. White: May I read some evidence and by way of further cross-examination of Mrs. Reardon out of her deposition?

Mr. Taylor: I have no objection to this.

The Court: All right, go ahead.

Mr. White: I am reading now on page 44 of Mrs. Reardon's deposition in this case at line 23:

"Q. Tell me again all that you remember of the incident when Mr. Lands assigned you the task of designing a brief girdle to track Exhibit L?"

For purposes of this case I think we can agree that Ex-

hibit L may be assumed to have been Exhibit 29 in this case, the Keystone panty.

The Court: Read the question again, please.

(217) "Q. Tell me again all that you remember of the incident when Mr. Lands assigned you the task of designing a brief girdle to track Exhibit L?"

The Court: Which is Exhibit 29 in this case?

Mr. White: Yes, your Honor.

The Court: All right.

"A. I don't remember very much. He gave us the—gave me the assignment to track a brief with 41-28."

That, again, your Honor, is Exhibit 29 in this case.

"A. I don't remember what I did. There are probably some other garments that you have never seen that were seen in Reading."

Reading is the factory of Vanity Fair Mills.

"A. This one had some interest (indicating)."

The Court: Indicating Exhibit 29? Mr. White: No, your Honor.

"Q. Meaning Exhibit- A. Right.

"Q. —M?"

Exhibit M referred to and indicated by Mrs. Reardon in that answer was the 446 Olga garment in this case.

The Court: I think you have got to go over that

last little bit, because the reporter may not have it (217a) and I don't have it.

Can I have a copy?

At this point I will need to adjourn for lunch.

We will adjourn until two o'clock.

I would like to have a copy of the deposition.

(Luncheon recess.)

(218) Afternoon Session

2:00 p.m.

Mr. Taylor: If the Court pleases, I have offered to Mr. White the opportunity for interrupting my case to permit the examination of Mr. Hoopes, who has come on here from Kansas City, Missouri, and who is operating one of the subsidiaries, and Mr. White has agreed that would be satisfactory.

So with your Honor's permission I will relinquish my order of proof to permit the interposition of the testimony of Mr. Hoopes.

The Court: Who will examine Mr. Hoopes?

Mr. Taylor: Mr. White.

The Court: I think that is fine.

Mr. White: If it pleases the Court, before we get to that, I would like to revert to the question of the Reardon deposition briefly.

The Court: Why don't you finish reading what you want to from the Reardon deposition.

Mr. Taylor: I made this offer-

Mr. White: I have a shortcut, your Honor.

Mr. Taylor will offer that whole deposition without objection. I will then read it from those portions (219) that I would like to emphasize for my purposes.

The Court: I will tell you on depositions, I am going to ask you to designate what you are interested in, because I would like, if possible, to have this case in a posture where I can dictate an opinion at the conclusion of the evidence.

You are entitled to have depositions in evidence, but I want to know what parts each party is relying on right here and now.

Why don't we defer the subject of the Reardon deposition and go ahead with Mr. Hoopes and we will take care of the Reardon deposition later. All right?

Mr. White: Yes.

Mr. Taylor: If your Honor please, I have also something to hand up to you. I have Xeroxed all of the garment cases decided by the various courts mostly in this district and I thought it might be convenient for you or your law clerk rather than to have to get the volumes.

I have prepared an index so you can immediately find the case, but they are all cases dealing with garments.

The Court: Fine. I will take that.

Mr. White: The defendant calls Mr. Hoopes for (220) cross examination, your Honor, as an adverse witness.

Donald Francis Hoopes, called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. White:

Q. Mr. Hoopes, are you the executive vice president of the plaintiff? A. Not at this time, no, sir.

Q. What is your present title? A. I am president of the H. D. Lee Company.

Q. Is that a subsidiary? A. That is a subsidiary of the VF Corporation, as is Vanity Fair Mills a subsidiary of the VF Corporation.

Q. In the period 1965 to 1969, were you executive vice president of the plaintiff? A. Substantially for all of that

period.

Q. And among your responsibilities was that of marketing, sales forecasting, planning, inventory control and general management matters with respect to foundation garments made by the plaintiff? A. With respect to a great deal more than foundation garments; lingerie, robes, lounge wear, the entire product line of Vanity Fair Mills.

(221) The Court: What are the items? You went a little too fast for me.

Marketing-

Mr. White: Sales forecasting, planning, inventory control and other general management matters.

A. Yes, sir. That is basically correct.

Q. Are you familiar with the introduction into the foundation garment line of the plaintiff of its so-called 40-28 garment? A. Yes, sir, I am.

Q. And for the record that is Exhibit 23.

In fact, you had some considerable degree of personal responsibility for the decision to add that to the line, wasn't that the case? A. I think as chairman of our line development committee that is correct.

Q. What was your line development committee? I am speaking now, just for completeness, specifically in the period 1965 and 1966, Mr. Hoopes. A. Well, the line development committee consisted of a rather large group of people. The content of the committee varied from time to time, but

more often than not myself as chairman, Miss Ellen Hoskins, who was our product manager, Miss Marguerite Hight, who was a fashion (222) coordinator, Miss Janet Taylor, who at that time was our advertising and promotion director, various merchandise managers of the individual product lines, Mr. Lands in foundation, Mr. Sturtz in robes and lounge wear. We had no special merchandise manager for lingerie.

The group might be supplemented from time to time by members of our sales force, our executive selling staff, our executive manufacturing staff or specialists assistants in those areas. Rather a large group, sir. I believe that covers the principal people that would be involved.

Q. Do you recall Vanity Fair's brief which is in evidence here as 40-6? A. Yes, I do.

Q. That is in evidence in this case as Plaintiff's Exhibit 20.

The Court: The number is not completely legible. It is No. 26.

Q. Is that not so? I am just asking you to identify it. A. I believe this is 40-6. I have every reason to believe that it is.

Q. And it had been reported to you by Mr. Minrath or others in your company in the period of early 1966 (223) that Exhibit 26 had certain deficiencies, is that not so? A. I think it would be correct to say that there were certain features of this garment which Mr. Minrath and others felt could be improved to enhance its success in the marketplace.

Q. And one of those had to do with the degree of tummy control? A. I did not have it described as that nor do I understand it as that.

It was, in my judgment, an increased span of control at the waist of the garment.

Q. But at the waist of the garment, do you mean literally the elastic which encircles the top portion of the garment? A. I think I can best illustrate on the garment if I may, sir.

I mean this area here where there is no panel. It was our desire to have an increased span of control in that area (indicating).

Q. Just for clarification, not just the circumference of the upper waist? A. No, not the waist band, no, but the area below and to the outside of the top portion of the garment.

(224) The Court: You say not all the way around?

Mr. White: Your Honor, I was a little afraid maybe the record would be unclear when the testimony talks about increased control at the waist. It just literally means that circumference of the very top. As the witness has explained, it is the area immediately below the top of the garment.

The Court: Right. You both have indicated about three inches below the top of the garment, is that correct?

The Witness: What I am trying to indicate, your Honor, is that in this garment, control is focused toward a point at the top center front and we had requests for a garment which would have additional control outside from that point in the top area of the garment, in this area, sir (indicating).

The Court: All the way around?

The Witness: No, sir.

The Court: Or in the front? The Witness: In the front.

Mr. Taylor: You are talking about Plaintiff's Exhibit 26?

Mr. White: Yes.

Q. The other respect in which Exhibit 26 was thought (225) to be deficient, if I could use that word, was— A. I have rejected my agreement with deficiency. It was a matter of a feature which would enhance or improve the salability of the garment in the trade.

Q. As so amended, the other respect in which improvement was felt to be indicated in Exhibit 26 at this time was in respect of the leg openings, is that not correct? A. That is correct, yes, sir. Yes, sir, that is correct.

The Court: What was the improvement that you thought was needed in the leg openings?

The Witness: I had received reports, your Honor, that the bottom edge of the leg when unattached by garters to hosiery had a tendency to curl out from the body.

Let me illustrate visually.

Q. Did that result in discomfiture?

The Court: I don't think he finished.

The Witness: I just simply wished to illustrate, your Honor, unattached by garters this garment had some tendency on some figures when you are attempting to fit a very wide range of diameters and as that leg diameter got larger there was a tendency for this edge to roll.

The Court: Roll outward?

(226) The Witness: Outward from the leg, inward toward the garment.

Q. And resulting in some discomfiture to the wearer!
A. I would think so. Not being a wearer—

Q. I take it, then, you disagree with Mr. Lands who testified this morning that it is absolutely unnecessary to

ever wear garters with a panty brief? A. I would have to disagree with any judgment that say absolutely never, because the garment is worn on an infinite variety of figures and could have obviously different results.

Q. And this problem in regard to Exhibit 26 was of sufficient magnitude to cause you to direct your attention and the attention of your associates toward ways and means of elevating it, I take it? A. Yes, sir, I think that would be right.

Q. This garment, Exhibit 26, was eventually superseded by your so-called or what has been in evidence here as Exhibit 23, which is called the model 40-28, is that not correct? A. I think that that is correct. The 40-6 was withdrawn and I believe in our hope or anticipation 40-28 would have served as a replacement for the 40-6.

Q. Is it not also the case, Mr. Hoopes, that prior (227) to the final decision in that regard, your committee or your company considered approximately six design candidates as a possible replacement for Exhibit 26† A. At the time of the giving of the deposition in 1968 that was my reaction. I specified then I could not be accurate about it.

Q. But No. 6 came from you, not from the questioner? A. No, sir, it came from me. 6 or 7, I believe, I responded.

Q. Is it not the case, Mr. Hoopes, in the foundation garment industry that a particular garment has generally what is regarded as a finite commercial life span? A. I think in general that is true.

Q. Is it not the fact that the length of the commercial life span of any particular garment is indicative of the garment's fundamental or basic nature? A. I think that that is—I believe I understand what you are inferring, that the longer the life the garment has the more basic or fundamental it is apt to be.

I would agree with that if I am understanding you.

Q. Would you think that a life span, a commercial life span of a particular panty brief, which is what we are talking about here, of ten years would be indicative of a fundamental and basic garment? (228) A. Yes, sir, I would.

The Court: What do you mean by fundamental and basic garment? I don't know what you really mean.

Mr. White: I am going on, if your Honor please.

Q. And a garment which performed a function that was rather fundamental? A. I would agree with that.

You are reading, I believe, from my deposition.

- Q. And had broad daily utility to the consumer? A. Right.
- Q. And something that was not a special occasion? A. Right.
 - Q. And was not dictated by fashion? A. You are right.
- Q. Or something which you could comfortably live with day in and day out? A. Yes.
- Q. And it was performing the function for which the woman bought it? A. Yes.
- Q. And is it not also true in regard to foundation garments and panty briefs in particular that function is the No. 1 criteria in the consumer's mind? A. In my judgment, that is correct.
- (229) Q. By the way, who was Mr. Minrath in the 1965-1966 period? A. Mr. Minrath was our vice president in charge of sales.
- Q. Mr. Hoopes, you had discussions with Mr. Minrath regarding the matter of improving Exhibit 26, did you not? A. Yes, sir or developing an improved brief. I don't really believe it was necessarily improving that garment.
 - Q. During those conversations you did discuss the Olga

garment, which was at that time known by the style number 446, did you not? A. Yes, sir.

Q. Could you now state or recall the substance of such discussions with Mr. Minrath? A. I am probably recalling more from the deposition than I am from the point of time, but it is my recollection that Mr. Minrath indicated to me that the Olga brief 446 as we knew it was one of the better selling briefs in the industry and that it had certain features which customers considered desirable.

Q. And is it not so that those very features were those which had been complained about in your 40-6 garment, Exhibit 26? (230) A. I think features or functional characteristics, that is correct. It was felt that that garment gave a greater degree of span or control at the waist and had an improved leg opening.

The Court: Just one minute.

You said Mr. Minrath indicated to you that the Olga garment included certain features.

Did he specify the features, sir?

The Witness: No, your Honor. That is why I changed features to functional characteristics. Features, to me, would have been specific details of the garment which implemented the degree of control.

The Court: Did he use the word functional characteristics?

The Witness: Yes.

The Court: He used the word functional characteristics?

The Witness: He referred to function, yes.

The Court: What did he say specifically about the functional characteristics of the Olga garment?

The Witness: In my recollection, again, the functional characteristics he mentioned of the Olga garment were that it had an increased span and degree

of control at the waist and that it had an improved leg opening.

(231) The Court: Did he tell you how that was achieved? Did he describe it in any way?

The Witness: No, sir.

The Court: Did he show you a picture?

The Witness: No. sir.

Q. But you were familiar with the Olga garment at that time? A. Yes, sir, I was.

Q. And, in fact, at that time you were not familiar with any other garment that had the shape of leg opening of the Olga garment, is that not correct? A. I don't know that I could answer that positively. There may have been other garments in the trade with similar leg openings.

Q. Would you just look at page 42 of your deposition at line 22, please, and see if that helps you. A. I think this says exactly what I have just said, sir. The answer was, "Well, I'm certain that there were other garments that had increased waist control. I am not familiar with other garments that had the shape of the leg opening that the Olga garment had."

That is substantially correct. There may have been others, I may have seen them.

Q. Mr. Hoopes, when did you drop your respon- (232) sibilities in regard to the sale or marketing of the 40-28 garment? A. I cannot be precise, but it would be either late 1968 or early 1969.

Q. Before the garment was phased out? A. Yes.

Q. Since you are the only one that I am going to have an opportunity to ask this question of this afternoon, I am going to ask it, but if you can't answer it, of course, you needn't.

What is your best knowledge and information of the quantity of 40-28 garments sold by Vanity Fair? A. I would not care to make an estimate of that.

Q. Can you give me a figure below which you know it was not?

Mr. Taylor: If your Honor please, since your instructions are that I should try to get some figures in some way, this is merely speculation on the part of Mr. Hoopes and I don't think that your Honor ought to permit Mr. White to continue on a subject which you have given us specific instructions about.

The Court: I will overrule that.

He is asking if he can estimate a minimum.

Mr. White: Yes.

(233) Q. If you can, Mr. Hoopes. Don't you see, you have heard the Court's statements on this subject and we all want to expedite things and I myself have been dying to know for some time what the general order of magnitude of sales of this garment are, subject to correction by later more precise information. A. I regret, sir, I do not appear here on behalf of Vanity Fair Mills but, rather, at your request and I would not feel authorized to speculate.

Q. It is correct that I gave you no forewarning-

The Court: It is not a question of who authorized you to do what.

Do you have any knowledge that would enable you to answer that question of the minimum?

The Witness: Yes, sir, I think I would have knowledge that I could make the—

The Court: All right, sir.

The Witness: The Court is directing me, sir, to make that estimate?

The Court: Your responsibility is to answer the questions asked you.

The Witness: Yes, sir.

You are asking me for a number below which-

Q. I have phrased it awkwardly.

(234) What is your minimum estimate and what is your maximum estimate? Why don't you give me a range. Then we will understand that if it later on turned out to be wrong we are not going to hold it against you. A. I would make a minimum estimate, sir, of 10,000 dozen and a maximum estimate of 15, 16,000 dozen.

Q. Over the entire period that it was in the line? A. Over a two-year period that I understand it was in the line.

The Court: What were these selling for?

Q. Do you have an average selling price? A. I believe this garment retailed at \$7 a garment, which I do not know the wholesale price per dozen at \$7. I would guess.

The Court: Exhibit C says \$45 a dozen.

The Witness: I was going to guess \$42, something in that area.

The Court: We can get that.

Mr. White: We know a lot more than we did this morning on the subject anyway. Thank you, Mr. Hoopes.

The Court: Any cross examination, Mr. Taylor? Mr. Taylor: No, I have no cross examination of

Mr. Hoopes.

The Court: Mr. Hoopes, after you and Mr. Minrath (235) discussed the Olga garment, what

happened?

The Witness: I issued instructions to our design staff, our foundation design staff, to execute for us a garment which had the features that we were talking about, increased degree of span control at the waist and an improved leg opening.

Subsequently, design candidates began to be sub-

mitted to our line development group for evaluation

by that group.

Actually, the waist control feature of the 40-28 brief first came to our awareness or at least mine as chairman of that committee when a style 41, which ultimately became 41-28 was shown to us, which indicated we felt a solution to the problem of the increased span and degree of control at the waist, and I recall that instructions were then sent to the designer to convert this into an appropriate brief since it had the feature at the waist which we had been searching for.

The Court: I am not sure I understand.

You had the discussion of the Olga garment, right?

The Witness: Yes, sir.

The Court: You knew what the Olga garment was, what the features of the Olga garments were? You already (236) said that.

The Witness: They were reported as being satisfactory and, in fact, well considered in those par-

ticular areas, yes, sir.

The Court: You knew how the Olga garment was designed, didn't you?

The Witness: In specific detail I would have to say no, sir.

The Court: Did you know it had a par 1 in front?

The Witness: Yes, sir.

The Court: Did you know it had a crotch piece going down under?

The Witness: Yes, sir.

The Court: And did you know that the leg opening was made up of the crotch piece and the body of the garment?

The Witness: I don't believe that that type of detail would have been something I would have

been aware of, your Honor. To me it was a panty brief, a panelled panty brief reported to have characteristics. Exactly how the functional characteristics of the garment were achieved I do not believe I would have been that detailed familiar with.

(237) The Court: Who conveyed instructions? Did you have one designer or several designers, a team or what?

The Witness: It is my impression that at that time, sir—and this varied; we have had as many as ten or eleven designers in our entire group—at that time I believe we had at least two working in the foundation area. We may have had three.

The Court: Who drew the designs for the new panty brief, or the design candidates, I think you said?

The Witness: Who executed those design candidates?

The Court: Right.

The Witness: For the panty briefs?

The Court: Yes.

The Witness: It would be the two, if there were two foundation designers at that time, it would have been one or the other or both of those who would have executed candidates and sent them to our attention.

The Court: Was one of them Mrs. Reardon?

The Witness: Yes, sir.

The Court: Do you know the name of the other one?

The Witness: No, sir, but our records would indicate the name.

(238) We had a girl Rosalie Fall. Whether or not she was working in that area at that time or not specifically I cannot answer.

The Court: But definitely Mrs. Reardon and possibly one other?

A. Yes.

The Court: And the instructions to those designers were conveyed by whom, did you say?

The Witness: It would have been one or the other or two people. In this case our product manager, Miss Hoskins, who had the day-to-day supervision of our various designers, and/or Mr. Lands, who was the merchandise manager for the foundation—

The Court: Miss Hoskins and/or Mr. Lands?

The Witness: Yes.

The Court: Did you say six designs were gotten up?

The Witness: I estimated in 1968 when the deposition was taken that I thought the number of design candidates were approximately six or seven. No count was made of those by myself.

The Court: Do you recall, were any of those designs like this Exhibit 23?

The Witness: No, sir.

(239) The Court: Exhibit 23 is the-

The Witness: Yes, sir. I am trying to understand your question and give you the correct kind of answer.

Exhibit 23, that design would have been one of among the six or seven, and what we must understand is that the six or seven executions do not come to our line development committee, did not come at any given time, they come from the course of the development period which would be perhaps a four or five or six month period.

The Court: Did you review the designs?

The Witness: Yes, sir.

The Court: Was one of those designs like this Exhibit 23? Did it have the features of this Exhibit 23?

The Witness: After it had been requested, yes, sir.

The features of that garment first came to our attention in a panty brief and—panty girdle. Instructions were then sent back to the design staff to execute this type of waist control and stitching motif in a panty brief, being one among the six or seven which we received, was received substantially in that form.

The Court: In other words, you had a drawing and then you had it executed and then it came back to you?

(240) The Witness: No, sir; no, sir.

Our development group received all garments as finished garments. We received a panty girdle which eventually become known as 41-28.

Mr. White: I think that is Exhibit 29, your Honor.

The Witness: Yes, we received that garment.

The Court: You received this garment Exhibit 29, which you call a panty brief?

The Witness: Yes, panty girdle I believe they are called.

The Court: Then what happened?

The Witness: And we observed the degree and span of control at the waist in this garment and issued instructions to the design staff to execute a brief following that degree and span of control as illustrated by that panty girdle.

The Court: Who issued those instructions?

The Witness: I believe I did, your Honor.

The Court: And your instruction was simply to have a brief with this degree of control, right?

The Witness: Yes.

The Court: What about this panel that we see in Exhibit 23, did you issue instructions to have a panel?

(241) The Witness: I issued instructions to duplicate the design in the panty girdle in a brief. I gave no instructions other than that.

The Court: Do you know how the panel came about?

The Witness: No, sir.

The Court: You don't know how it came about that this Exhibit 23 had a panel?

The Witness: The other garment does not have a panel, is that it?

I don't really know.

The Court: I am talking about what I will call the separate panel which is stitched on three sides and is partly free. Do you see that?

The Witness: Yes, sir, I see that.

The Court: And it is attached to the crotch.

Do you know how it came about that that—there is no such panel in Exhibit 29, is there?

The Witness: There appears to me to be a panel on the inside of this garment, your Honor.

The Court: You are talking about Exhibit 29 and you are saying there is a panel inside stitched a lot closer than the panel in Exhibit 23. Isn't that so? I mean, it has rows of stitching, so it is more closely integrated with the body of the garment, isn't it?

(242) The Witness: Yes, sir, I think this is.

The Court: Whose idea was it to get this type of panel that we have here in Exhibit 23? How did that come about?

The Witness: So far as I know, it was the designer's idea, your Honor.

The Court: It didn't come about through your directions?

The Witness: No, sir.

The Court: And you have no idea how it came about, is that correct?

The Witness: No, sir, other than the designer executed it in that fashion.

The Court: All right, go ahead, Mr. White.

Mr. White: I have no questions. Mr. Taylor: I have no questions.

The Court: All right, you are excused.

(Witness excused.)

The Court: Next witness.

Mr. Taylor: May Mr. Hoopes then leave for his home in Kansas?

The Court: As far as I am concerned he may.

Mr. Taylor: Thank you.

Mr. White: It is a good time now because it (243) comes chronologically, do you want to hear from Mrs. Reardon by way of her deposition on this subject?

The Court: It is entirely up to you.

Mr. Taylor: I have offered the entire document, so Mr. White may read any portions he wishes.

I think it would be much simpler to just put the original copy, which is the signed copy here, and have Mr. White pick out any portions that he wants and that will relieve me of any attempt to further offer because I can then use the document as it is.

The Court: How long is the deposition?

Mr. White: 50 odd pages. Mr. Taylor: 52 pages.

The Court: I will count on Mr. White and you to designate the portions you are relying on.

Mr. White: May I read them out loud?

The Court: As far as I am concerned, we are going to have to cover the case as we go. We might as well read them out loud right now.

Mr. White: That is what I would like to do.

The Court: I would like a copy. I think it is a good idea to have it in evidence.

Mr. Taylor: This is the original copy.

The Court: Who is offering the deposition?

(244) Mr. White: Mr. Taylor is offering the deposition.

The Court: You have no objection to it?

Mr. White: I have no objection, and I would like to read from it by way of extended cross examination of Mrs. Reardon.

(Plaintiff's Exhibit No. 37 was received in evidence.)

Mr. White: I am going to begin at the top on line 3 on page 37.

Does the Court need a repetition of Mrs. Reardon's background? I think it is in her testimony.

Page 37, line 3:

"Q. What is the function of freeing this outermost panel from the underneath panels beneath the outermost or the widest points of that panel?"

Mr. Taylor, do you mind for orientation to explain that the questioner had in front of him and was questioning Mrs. Reardon about Exhibit 23?

Mr. Taylor: No.

Mr. White: Exhibit 30, rather.

The Court: I will tell you on this exhibit, you better go through and substitute the trial exhibit numbers for the deposition exhibit.

Mr. Taylor: I think Mr. White ought to do it. (245) Mr. White: I am going to do it on the part that I read as I go along.

The Court: Just so long as it is done on the whole deposition. All right.

We are talking about what item here on page 37?

Mr. White: I am sure what we are talking about is 40-28. If you: Honor will look back on the preceding page, it says "Looking now at Exhibit F, which is the production example of 40-28." I am questioning Mrs. Reardon about the accused garment.

Answer on line 7 on page 37:

"To give you more circumference for the leg which, in turn, would give you more room. Especially when you sit your body expands and these things can be awfully uncomfortable when you are trying to fit a wide range of people.

- "Q. Where would the discomfiture manifest itself if it were attached rather than free, and how? A. This would be attached all in here.
- "Q. Yes. If the outermost panel were not free? A. And this would be the circumference. Now, you take some of this strand"—and I am sure, your Honor, he was saying strain—"Now, you take some of this strain off the leg and put it up here, therefore, when you sit this goes—you don't have that digging in the inner leg.
- (246) "Q. So one purpose of the freedom of the outer panel with respect to those beneath it in its lowest portion is comfort, would you say, greater comfort to the wearer? A. Yes."

Now I would like to pick up, your Honor, on page 40 of this deposition, at line 22.

I would like to go to line 14, rather, on page 40 to

get continuity.

This is part of a question. "Take Exhibit J." That, your Honor, is Exhibit 24. It is the garment of the defendant from which the overlying panel has been taken loose.

"Take this Exhibit 24 and imagine it as though this loose flap, which originally constituted the outermost panel, were just completely removed from it.

"A. Right.

"Q. And imagine this garment now being correctly fitted for the same person that it was originally fitted for. I am trying to ask you whether it is truly your opinion or testimony that this changed garment would be as satisfactory a one as it was originally with the outer flap in place. A. I couldn't tell you if it—before or after were more satisfactory, I would have to wear it, we would have to sell it, we would have to do a lot of things.

(247) "Q. Is it your testimony that the outermost panel, this loose hanging one on Exhibit 24, is intended or put

there solely for appearances sake? A. Appearance.

"Q. It performs no appreciable function at all? A. Appearance and also it does relieve some of the tension, up and down tension on the crotch, giving you a wider circumference around the leg breaking that circle.

"Q. Well, in terms then of function rather than appearance, let us see if we can't put it into words again what the functions are of that outer panel. Does it— A. The func-

tion?

"Q. Yes. Does it contribute to the comfort of the wearer? A. The comfort of the legs."

Now we go to page 43, please.

Now for continuity, your Honor, I am questioning in this deposition Mrs. Reardon about what is here referred to as Exhibit L but what in this trial has been referred to as Exhibit 29, which is the panty girdle.

This is line 23 on page 43.

"Q. Now, the question is:

"Why did you not do that since your objective was, as you put it, to design a brief—"

(248) The Court: Where are you, on line 23?
Mr. White: Let us go to line 18. I jumped into the middle. I tried to cut it too short. Line 18, page 43.

"Q. You could have duplicated that brief— A. Yes. "Q. —in a brief girdle the panel construction of Exhibit

"Q. Now, the question is:

29? A. Yes.

"Why did you not do that since your objective was, as you put it, to design a brief girdle that would track with—and by that I assume you mean similar in appearance to Exhibit 29? A. We had probably objectives in mind like freeing up this leg. It just worked out that way. I don't know. You really don't have a reason for why you make every single garment. I mean, I have three layers here so I eliminated the seam. We were talking about at the time diaper effects in garments."

Now I am going to skip down to line 23 on page 44:

"Q. Tell me again all that you remember of the incident when Mr. Lands assigned you the task of designing (249) a brief girdle to track Exhibit 29. A. I don't re-

member very much. He gave us the—gave me the assignment to track a brief with 41-28 and that is Exhibit 29. I don't remember what I did. There are probably some other garments that you have never seen that were seen in Reading. This one had some interest.

"Q. Meaning Exhibit— A. Right.

"Q. -M?"

That is Exhibit 30 in this action.

Your Honor, I misspoke when I began in this just before the break. Exhibit 30 is a garment of Vanity Fair and I misspoke in saying that it was a garment of the defendant. That is not the case, Exhibit 30 is like Exhibit 23. It is a Vanity Fair accused garment.

The Court: Was this in existence when they were

designing 40-28?

Mr. White: Obviously it could not have been in existence, but I don't know. She is pointing. She is saying, "This one had some interest in it."

I think what she means is that Mr. Hoopes committee had evidence some interest in it, if I could read her mind.

"Q. -M.

(250) "Why did this one have more interest than the others? A. We discussed the diaper concept, you know, wrapping of the body like a toga effect, or, you know, like a baby's diaper, of making a brief and—

"Q. Did you discuss at that time the fact that Olga had a brief on the market of this general type? A. No.

"Q. You didn't know that at the time? A. I have seen her garments.

"Q. Had you seen it when you designed 40-28? A. I had seen it long before that. It's been around for ages.

"Q. Where had you seen it, I mean, in general? A. Well, I have seen it in stores. We have had the garment for costing and we see it on our models. We see every new garment that comes out, go out and buy it, run it through costing.

"Q. When did you run it through costing first? Would

you have been involved in that? A. I don't know.

"Q. How do you know it was done? A. I was told when this whole case came up."

I think, your Honor, she means this lawsuit.

(251) "Q. Did you ever have one in your design studio or office or whatever you call your work space? A. Yes. "Q. When? A. We have it right now."

This, of course, means at the time of this deposition, which is in November 1968.

"Q. When did you first have that? A. It was there before I came."

The Court: What would that be?

Mr. White: I think that is when she went to work.

The Court: When did she come?

Mr. White: That would be in the early part.

It certainly was before this incident that Mr. Hoopes testified about.

The Court: Does the deposition show when she came to work—

Mr. White: It is on page 4. In May of 1969, count back five years. She came to work in May 1964. At least I assume that that is correct.

Most people say it will be five years in May and they mean the coming up May, not the last May.

The Court: All right, go ahead.

(252) Mr. White: "Q. An Olga garment like Exhibit 6 for identification?"

Exhibit 6 for identification in this trial is Exhibit 16.

The Court: Exhibit 6 is the same as Exhibit 16 in the trial?

Mr. White: Yes, sir. That is the commercial Olga garment.

"A. We have boxes of competitors' garments.

"Q. So there wouldn't be any misunderstanding, your testimony, then, is that an Olga brief such as Exhibit 16 was present in your design space? What do you call your area? A. Studio.

"Q. In your design studio? A. Not in my studio. We have an area where we keep competitive garments and the

garment is there.

"Q. I see. Well, describe that area or place that you work in? A. Well, it is really a conference room. We meet salesmen there. We just had some reorganization so they

just had a corrugated box in the corner.

"Q. I guess what you are saying would be almost (253) self-evidence as a design group at Vanity Fair it is incumbent upon you to be familiar with what your competitors' designs are, wouldn't you say that is true? A. Part of our job is to know what garments are selling, what is in the store-" she means, your Honor, Altman's and so on-"why they are selling, why they are not selling.

"Q. Exactly. What I am really saying is there isn't the slightest doubt, is there, but that Olga's brief girdle of the type of Exhibit 16 was fully and completely known to the Vanity Fair design people at the time those people, and specifically you, took up the design of what became style 40-28? A. I knew about the garment, I'm not saying other

people did.

"Q. But you do know about it in the same way—you knew about it because it had been present in your area or in the company's area at that time? A. I knew about it before that. I had seen it in stores, ads."

Your Honor, I suffer from the common failing of asking a whole lot more questions than I should.

The Court: You read as much as you wish. It is all in evidence.

(254) Mr. White: I will go on.

- "Q. Right. What I am really asking you, you are not testifying that this design of Exhibit 40-28 was entirely original with you in regard to the crotch construction and panel construction? A. I don't think there is anything new.
- "Q. Would it be fair to say that when Mr. Lands assigned you the job of designing a brief girdle to track your Taper Mate styles he specified to you that the design include a free front panel similar to the Olga designs? A. He didn't specify, we discussed diaper concepts in general. I can't remember. It is such a long time ago.

"Q. Would you call the Olgo garment, Exhibit 16, a diaper type garment? A. It is a wrap type concept more than a diaper concept.

"Q. I am trying to get an idea what you mean by diaper concept. A. This business, taking a triangle, just like a baby's diaper.

"Q. What is there about this concept that you thought would be useful for making ladies' foundation garments? A. Comfort, simplicity in manufacture, mostly the (255) leg area."

The Court: When you say "this concept," what do you mean?

Mr. White: The diaper concept.

The Court: Where does the diaper concept come in? Are any of these garments diaper concept?

Mr. White: She is calling them in this deposition. She is saying on working on her 40-28, she was saying, "Well, we were using a diaper concept."

The Court: All right.

Mr. White: So I was agreeing with her and I said, "Well, what did you like about it?"

She said, "Comfort, simplicity in manufacture, mostly the leg area."

That's all I wanted to read.

The Court: All right. Let us have a recess.

(Recess.)

Mr. Taylor: If your Honor please, I assume that Thursday morning would be appropriate for me to give you the underlying or designated portions of the deposition.

The Court: Yes.

Who is your next witness?

Mr. Taylor: I call Mrs. Erteszek.

Mr. White: Your Honor, Mrs. Erteszek in the prin- (256) cipal witness for her own case and I am wondering whether it is conducive to expedition for the plaintiff to call her for cross examination before she gives her direct examination.

Mr. Taylor: You see, your Honor, this being a declaratory judgment action, I have the burden to prove the invalidity of the patent and, therefore, I must have the testimony of Mrs. Erteszek because it will bear directly on that issue.

I didn't make any point in his call calling other witnesses of mine which I might have insisted were part of my case.

The Court: You do what you feel you should do, Mr. Taylor. If you wish to call Mrs. Erteszek, go ahead and do it.

Mr. Taylor: Of course, she is an adverse witness, as you will learn from what Mr. White just said.

Will you take the stand, please.

(257) Olga Erteszek, called as a witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

Pirect Examination by Mr. Taylor:

Q. Mrs. Erteszek, will you state your full name and residence, please? A. My name is Olga Erteszek. I live at 631 Bonhill Road, in Los Angeles, California.

Q. Are you employed or associated with any company? A. Yes. I am a vice president of the Olga Company in

charge of design.

Q. That is the Olga Company, Inc., which is named as a defendant in the proceeding brought by Vanity Fair

Mills, Inc.? A. That is right.

- Q. How long have you been engaged as an officer of the company to which you have just referred? A. Well, ever since the incorporation. I actually started the company along with my husband, but I don't recollect exactly the year that we were incorporated and I became a vice president.
- Q. It has been a good many years, has it not? A. Yes. (258) Q. Could you just give me on the order of 10, 20 or what? A. Oh, I would imagine 12, 15; I'm guessing, really.
 - Q. What has been the nature of your duties with the

Olga Company, Inc. since the time that you became associated with it? A. My very first original job was designing. I was the only and sole designer. I worked very closely with my husband, who took on the job of managing and the business end of it.

Q. And as a designer, what garments, if you will state, that you have designed or have been interested in the design? A. Girdles, brassieres, lingerie, lounge wear more recently. That about covers it, I suppose.

Q. And your present duties are specifically what? A.

I am the head designer.

Q. And how long have you been the head designer of Olga Company, Inc.? A. Ever since I—the business developed to the point that I wasn't able to fulfill the needs of the design all by myself, we started hiring on help, assistants to me.

Q. And how long has that been? (259) A. Now, again, I will have to guess.

Your Honor, I have a bad memory for-

The Court: Just give us your best estimate.

The Witness: I would imagine about 20 years.

The Court: Tell me again, how old is your company?

The Witness: 30, a little better than 30, your Honor.

Q. Mrs. Erteszek, I show you a copy of U.S. Patent No. 3,142,301, granted July 29, 1964 for elasticized panty garment, and I will ask you to state whether or not you are the O. Erteszek or Olga Erteszek named as the patentee in that patent? A. Yes, sir, I am.

Q. And would you tell me just rather briefly in general characterization the nature of the garment which is the subject matter of the patent, Plaintiff's Exhibit 1? A.

This is what is called in the industry a brief. A brief is a panty girdle without legs. In other words, a body encircling garment with a crotch so that it could function with or without garters.

Q. And will you tell me how long has the industry known a garment as you have designated it, a brief? A. A brief

per se has been in the industry for many years.

(260) Q. And that would then indicate a brief as a garment which has a girdle portion and a crotch portion and no legs? A. Well now, I would have to alter somewhat the description.

Girdle in our vernacular means a body encircling piece

of fabric, be it elasticized or otherwise.

Girdle is a generic name, your Honor, and it refers to what we call a skirt girdle, a brief, a panty girdle and in a broad sense also a foundation, which is a full type of corset, so to speak, that begins at the lower anatomy and goes throughout the whole body trunk of the woman's body.

Q. Does the drawings which are present in the patent before you, Plaintiff's Exhibit 1, have a girdle such as you have described? A. Well, it has a combination of a girdle in this respect, that it encircles the body. Yes, in that re-

spect it does.

Q. Yes. Would you be good enough to point to the numerals, if you will, that indicate the portion of the garment which you designate as a girdle portion? A. Well, anywhere from No. 15 to No. 13 would be the girdle part.

(261) Q. In addition to the girdle portion shown in the patent, Plaintiff's Exhibit 1, is there a panel? A. Yes,

there is a panel.

Q. Is that indicated at 18? A. That is correct.

Q. And does the garment shown in the four figures of the patent contain an illustration of a crotch portion? A. Yes, it does.

Q. And is that numbered 22? A. That is correct. Excuse me, may I make a little—

Q. Go ahead. A. Your Honor, may I explain it. In this particular case, No. 22 is connected with the front panel, so it cannot be fully called an independent crotch, it is the panel connected with the crotch.

The Court: All right, I understand.

Q. Or the crotch connected with the panel, either way you want to say it? A. Yes.

Q. Keeping in mind the definitions which you have given with respect to a brief garment, would you say that fundamentally the garment illustrated in the patent, Plaintiff's Exhibit 1, is a garment long known in the art, (262) namely, a garment having a girdle portion, a crotch portion and a panel connected to the crotch? A. I am not quite sure I understand the question, Mr. Taylor.

Q. Are you familiar with garments long prior or prior, at least, to, let us say, 1961 or 1960 in which the panty girdle or brief consisted of a girdle portion, a crotch portion and a panel portion connected to the crotch? A. Yes, there were garments differently designed but generally

described in that way.

Q. Mrs. Erteszek, I show you a document which is here identified as Plaintiff's Exhibit 2, and I point to page numbered 8 at the lower portion thereof central, and I will ask you to state whether or not that is your signature which appears at that page? A. This looks very much like my signature. I would say yes.

The Court: Is there any dispute about that?
Mr. Taylor: No. I am just using that as a means
to introduce to her what the document is, that's all.

Q. Are you familiar with the nature of the document Plaintiff's Exhibit 2 for identification? A. I haven't seen

it for some time, but I am sure that this is the document which was presented to me at the (263) time of the application for the patent on that garment.

Q. And as you look through, did you find the successive actions which were taken by the examiner in the Patent Office and the arguments made in reply by your attorney?

Mr. White: What is the question?

The Court: What is the purpose of this?

Mr. Taylor: I want to come to certain points of the prosecution and I wanted to have Mrs. Erteszek say that she was familiar with the prosecution of the application in the Patent Office, because certain representations—

The Court: Why don't you ask her about it.

Were you familiar with what happened in the patent office?

The Witness: I was familiar at that particular time, your Honor.

The Court: All right.

The Witness: I would have to read through it and really study it. Not having the legal background it would be very hard.

The Court: Try your questions about the specific points, Mr. Taylor.

Q. At page 20 of the document which is the file history of the patent 3,142,301, the document being (264) Plaintiff's Exhibit 2, refers to the courtesy of an interview with the examiner on January 20, 1964.

Do you remember your attorney advising you of the fact that there was such an interview had with the examiner in connection with the prosecution of your patent, Plaintiff's Exhibit No. 1? A. I'm sorry, I don't have any recollection of that.

The Court: Excuse me, Mr. Tayor. That is in evidence.

Mr. Taylor: Yes.

The Court: Are there specific things that are not in that document that you think this witness will know that you want to ask her or do you want to just—

Mr. Taylor: Only this, that there are representations made that the applicant and so forth in the course of the remarks made by the prosecuting attorney and my question to Mrs. Erteszek is did she so advise the attorney in the course of preparing for or attendance at the conference with the examiner, because these are rather critical items.

The Court: All right.

You are going to be asked whether you gave certain information on those subjects to your attorney.

All right, Mr. Taylor.

The Witness: Thank you, your Honor.

(265) Mr. White: Does she have a copy of this exhibit in front of her?

Mr. Taylor: No. I haven't an extra copy.
Mr. White: I will put it before her (handing).

Q. I now refer to the document Plaintiff's Exhibit 2 at pages 20 and 21 and I call your attention to the following representation:

"As the examiner has indicated in the official action of December 10, 1963, one of the principal differences between applicant's garment and that disclosed in Rosenthal lies in the fact that applicant's panel overlies or is on the outside of the torso encircling body."

Do you recall instructing your attorney or participating in any way with the discussion that led to those remarks?

Mr. White: That merely repeats something that the examiner had done earlier in this exhibit on page 17, Mr. Taylor.

The Court: Mr. White, let Mr. Taylor ask his

question.

Do you recall discussing that remark with your attorney?

Is that your question, Mr. Taylor? Mr. Taylor: Yes, that is right.

(266) A. I'm very sorry, it's been a long time, ten years, and it is very hard to remember the exact discussion that took place.

As a matter of routine I always explain to my attorney what it is that made me or led me to make a garment differently or that I feel has a different feature than anything that I know is on the market. Whether that is what took place in this particular—at this particular occasion, I have a very hard time remembering. In fact, I don't know.

Q. What does the reference to Rosenthal suggest to you, Mrs. Erteszek? A. I am sure I couldn't remember, Mr. Taylor. I am sorry.

Q. I show you United States Patent No. 2,763,008 to W. Rosenthal for girdle panty garter belt here as Plaintiff's Exhibit 5, and I will ask you to state whether or not you have seen that patent before? A. As far as my recollection, I saw it at the deposition. I have not seen it before.

Q. But the reference made in Plaintiff's Exhibit 2, "That disclosed in Rosenthal," relates to the patent which you now have and is here identified as Plaintiff's Exhibit 5, correct?

(267) Mr. White: May I stipulate that it does, your Honor, or would that be out of order?

The Court: I think it is evident to everybody that it is. Mr. White stipulates it, I so understand it.

Mr. Taylor: But there are points that come up that I would like to have this witness at least in continuity for purposes of clarity.

The Court: I take it your question is foundation, so go ahead.

Mr. Taylor: That's right.

The Witness: Your Honor, I have stated before that I really have no way of remembering ten years ago what happened. I might have, then on the other hand at this particular moment I do not remember.

I remember seeing it at the deposition

Q. Mrs. Erteszek, I show to you a garment upon the Wolf form which is here identified as Defendant's Exhibit A. Will you state whether or not you have seen this garment before? A. I have seen it at the deposition.

Q. You have also seen it in this courtroom, haven't you? A. Oh, yes, indeed. I thought your question was before (268) this courtroom.

Q. And while you were sitting in the jury box the other day you had this in your lap, did you not? A. That is correct.

Q. What is it? What is the garment, will you tell me? A. In my educated opinion, this is a garter belt with a crotch inverted in it.

Q. Have you any idea as to the make of the garment and how it was identified? A. Well, I have heard what was going on in the courtroom and, of course, I do.

Q. You also heard of Rosenthal in connection with the remarks which I quoted to you from page 21 of the file history, which is here as Plaintiff's Exhibit 2, did you not? A. When? When are you referring to, what particular time?

Q. Whenever you consulted with your attorney or had other experiences which led you to examine the comment which was made on page 21 referring to Rosenthal. A. Yes, I have seen it in consultation with my attorney.

The Court: Seen what, the Rosenthal garment? (269) The Witness: This garment, yes, sir. The Court: Did you see it at the time of the patent proceedings?

The Witness: No, no, your Honor, I never saw it before.

The Court: Did you see it in consultation with your attorney in connection with this lawsuit?

The Witness: That is right.

Q. I show you a copy of United States Patent 2,763,008 to W. Rosenthal for girdle panty garter belt which is here as Plaintiff's Exhibit 5, and I will ask you to state whether or not you have seen the Rosenthal patent before? A. Again, I have to refer to my recollection.

The Court: I thought you asked her that a minute ago.

The Witness: Yes. Mr. Taylor: I didn't.

The Witness: I have it right here.

Q. Is this the patent that you referred to in the remarks that were made at pages 20 at 21 one of the principal differences between the applicant's garment and that disclosed in Rosenthal lies in the fact that the applicant's panel overlies or is on the outside of the torso encircling body?

(270) The Court: Is that something she said?

Mr. White: Yes.

Mr. Taylor: On her behalf.

The Court: Mr. Taylor, this is where we started in. This is a statement made by an attorney to the patent examiner, is it not?

Mr. Taylor: Yes. I am asking her if she is familiar with that representation.

The Court: I thought we covered this.

Are you familiar with that representation by your attorney?

The Witness: At this particular moment I don't remember it, your Honor. I probably read it at that particular time because I affixed my signature to it. However, whether I paid special attention to it or not, I cannot attest to it under oath.

The Court: That is the answer.

Mr. White: I think, your Honor, the witness is entitled to realize that her signature is not appended to this particular remark as she evidently mistakenly thinks.

The Court: I think you better take the document in your hand and follow it.

Mr. Taylor, there is no question that the Olga garment is different from the Rosenthal garment.

(271) There is no question that one has the panel inside and the other has the panel outside. If that was represented to the patent examiner, that is a statement of fact.

We have looked at these garments themselves for two days now and we know those are facts. The conclusions you draw from those facts we may debate.

Mr. Lands said he would never design a garment like the Rosenthal garment because the bottom part of it hikes up if it is not attached by garters.

I would like to get to the issues that are important in the case but not labor the obvious.

Mr. Taylor: Let me read this-

The Court: There are problems in this case, but it is not whether there is a difference between the Olga garment and the Rosenthal garment because there is.

Mr. Taylor: These statements, I take it, your Honor, are in the nature of admissions which are binding upon the plaintiff here and also on Mrs. Erteszek and I think that I ought to be able to bring out the points which I—

The Court: I would think we could stipulate that. A statement made on behalf of Mrs. Erteszek by her attorney in the patent proceeding, isn't that a statement on her behalf for which she is responsible?

(272) Mr. Taylor: Indeed it is. Of course, I have other questions which follow some of these admissions.

Mr. White: It is an oft-mooted question.

The Court: Is it?

Mr. White: Yes, but I don't object to having this so construed in this action. I will concede for purposes of this action only that any statement in those file histories is binding upon the defendant.

The Court: I can see why it might or might not be under different circumstances, but we have had a concession which I think is undoubtedly right here that the statements made by Mrs. Erteszek's attorney are binding on her as admissions.

Right, Mr. White, for the purpose of this case?

Mr. White: Any purpose that he thinks they are relevant for, your Honor.

The Court: All right, we have covered that.

Mr. Taylor: If you will bear with me just a moment, let me point to the next statement here which, of course, will lead to the questions that I would like to ask Mrs. Erteszek quite aside from that.

The Court: We have established that those statements are made on her behalf or were made on her behalf and she doesn't disown them, they are binding on her in this (273) action. That is established.

Mr. Taylor: The next sentence which reads on page 21 of Plaintiff's Exhibit 2—

Mr. White: Is it possible that the Court might follow this with a copy?

The Court: If you have enough copies I would like to.

Mr. Taylor: I don't have another copy. Mrs. Erteszek has the copy that was just handed to her by Mr. White.

Mr. White: I have it.

The Court: What page are you on?

Mr. Taylor: I am now reading from page 21, the sentence which begins at the fourth line from the top, "However, this is not, as suggested, merely a matter of choice since the applicant's structure permits achieving a result which is not possible in or even comprehended by Rosenthal's patent."

The Court: What is your question?

Q. Is that the contention which you make, Mrs. Erteszek?

The Witness: Your Honor, I have to admit to ignorance of the high points of law—

Mr. White: Read the preceding sentence. (274) That means the patent officer examiner. The Witness: Your Honor, may I interpret—

The Court: What is your question? Is it whether her attorney made that contention on her behalf at that time or whether she now makes that contention in this litigation?

Mr. Taylor: That is correct, in this litigation.
Mr. White: Is it true? He wants to know if

that is a true statement.

The Witness: Now, if I may, your Honor, interpret it in lay language, the question is whether my garment is constructed in such a way that it doesn't interfere or it is not possible in the construction of the Rosenthal garment. Is that correctly translated?

Q. Can you say whether or not that sentence which we have just read beginning "However, this is not," and so forth, as Mr. White suggested, is it true or otherwise? A. Well now, in my interpretation, it is true.

Q. Let us pass on to the next sentence.

"In applicant's structure, when tension is applied to the crotch portion, the panel is tensioned and this can impose—"

Mr. White: If you take it clause by clause I think it would be less confusing.

- (275) Q. In the applicant's structure, when tension is applied to the crotch portion, this is tensioned. Is that correct? A. That's correct.
- Q. And this can impose a flattening force on the abdominal portion of the wearer. Is that correct? A. That is correct.
- Q. Such force is superimposed on that of the torso encircling body to produce an important cooperative effect. A. That is correct.

Q. Continuing, "On the other hand, in Rosenthal when tension is applied downwardly by the crotch portion, the insert would be pulled inwardly away from the torso encircling body. Is that correct? A. That is correct.

Q. Will you demonstrate that by manipulation of the Rosenthal garment which is here as Defendant's Exhibit A

on the Wolf form?

The Witness: With your permission, your Honor, I don't work on a stiff form. It doesn't do anything. It is not pliable. It is like a board.

If I could ask your Honor's permission to show it on a live model, it would become immediately evident what it does.

(276) The Court: All right.

Q. Could we first before we move to the live model relate the performance defined by reference to the Rosenthal garment, which is here as Defendant's Exhibit A?

The Court: She has said she can't do that.

Mr. Taylor: It says here "When tension is applied to the crotch portion, the panel is tensioned."

Certainly that can be demonstrated just as your Honor saw it demonstrated the other day by Mr. Lands. I think that this witness ought to be able to do the same thing.

The Witness: I am sorry, Mr. Lands is not a designer, I am, and I work with live bodies. If you will permit me, your Honor, I am not able to show the function as well as I am not able to try out the comfort of a garment on a stiff model.

The Court: I think that is the answer to your question, Mr. Taylor. If you want to have Mrs. Erteszek demonstrate these features on a live model, you can do that, or Mr. White can do it on cross

examination, but she has answered your question. She says she can't undertake to demonstrate this on the dummy.

- Q. Would you explain why you can't demonstrate it on the dummy?
 - (277) Mr. White: She has explained it twice, your Honor.
 - A. I have explained it.

The Court: Explain it again, even if it is repeating.

A. Because a dummy does not work the same way as flesh does. Elastic tends to pull in the flesh which is rigid in this particular case or else produce bulges which wouldn't ever show on this body.

The Court: I don't know why we are wasting time. What is the difference to anybody here about whether we do it on a dummy or a live model?

Obviously the garment is worn by a live human being.

Mr. Taylor: Right.

The Court: We have a model here and there is nothing wrong in having a demonstration in the court. The model has leotards on and everything is fine and we can have it demonstrated. It is obvious no dummy wears the garment.

Mr. Taylor: No. But may I ask this:

Q. Mrs. Erteszek, will you show me on the dummy what you were going to do on the model to demonstrate this explanation? That doesn't necessarily mean you are (278)

going to demonstrate what happens, but I do think we ought to have—

The Court: I think we are wasting time. We were in hopes of having this case concluded by 4:30 in the afternoon and we probably won't do that. I wish you would either drop the point or let her use a live model. I think we are wasting time.

Mr. Taylor: Then, of course, I bow to your Honor's suggestion and go ahead with the model. The Court: All right.

Q. What you are going to demonstrate, Mrs. Erteszek, is that on the other hand in Rosenthal, when tension is applied downwardly by the crotch portion, the insert will be pulled inwardly away from the torso encircling body, is that correct? A. That is correct.

The Court: Let the record show that the model has put on the Rosenthal garment, Defendant's Exhibit A.

Why don't you ask your question again what you want her to try to demonstrate.

Mr. Taylor: Yes.

Q. This is what I would like to have you demonstrate.

The Court: You are again quoting from Plaintiff's (279) Exhibit 2?

Mr. Taylor: That is correct, at page 21.

Q. On the other hand, in Rosenthal, when tension is applied downwardly by the crotch portion, the insert will be pulled inwardly away from the torso encircling body.

Mr. Taylor: Mrs. Erteszek is about to demonstrate that on the live model.

The Court: Fine.

The Witness: Your Honor, I don't know whether I am allowed to say that, but this garment obviously cannot function without the garters being pulled down.

The Court: Can't you demonstrate the effect.

If the crotch portion is pulled-

The Witness: Yes, that is right.

The Court: Okay, fine.

The Witness: What happens in this case that the whole garment pulls down because there is no counter action on it that helps it.

This, incidentally, in the vernacular, again, of the intimate apparel is just a designated line which is called waistline. That is all there is to it. This is the waistline, just a belt.

A garment of this kind is supposed to fit from the (280) waistline down.

Now, in order to straighten out the panel, you have to pull it down, which, in turn, pulls down the whole garment because there is no counter action which will prevent it from staying at the original designated waist.

Mr. Taylor: If your Honor please, that is not even the remotest answer to the question which was put, which reads, "On the other hand, in Rosenthal, when tension is applied downwardly by the crotch portion, the insert will be pulled inwardly away from the torso encircling body."

Nothing could be more simple if that can be demonstrated.

Mr. White: What is it, the crotch portion is pulled downwardly—

Mr. Taylor: Yes. I will read the whole thing. "On the other hand, in Rosenthal, when tension

is applied downwardly by the crotch portion, the insert will be pulled inwardly away from the torso encircling body."

The Court: Let us take it in two steps.

Mr. Taylor: Yes.

The Court: We don't have the lawyer here who signed this, but do you understand what this means?

(281) The Witness: Yes, indeed, I do.

The Court: When this is saying "Tension applied downwardly by the crotch portion," is it tension applied down by the garters or tension in the actual crotch portion? The crotch portion isn't really pulled by the garters, is it?

The Witness: That is exactly what I was going

to say, yes.

The Court: So what Mr. Taylor is driving at is, this statement talks about tension applied downwardly by the crotch portion. That is the crotch portion, right?

The Witness: That is true.

The Court: Then it says the insert would be pulled inwardly away from the torso encircling body.

What is meant here by being pulled inwardly away from the torso encircling body?

What does it mean here?

The Witness: Well, I assume that the insert—this is referred to as the insert, this little piece, which is independent of the crotch which connects the crotch with the inside panel.

The Court: In other words, it is not the panel?

The Witness: Not the panel.

The Court: The insert is different from the panel, (282) right?

The Witness: That is correct. That would be my-

The Court: What does it mean the insert would be pulled inwardly away? What does inwardly away mean?

The Witness: This is something that escapes me. However, I assume that by pulling the outer part and adjusting the garter, you get a relief in the crotch part this particular insert so that it doesn't cut into—

Mr. Taylor: That has nothing to do with the representation, if the Court please, that pulling on the crotch portion the insert will be pulled inwardly. The insert is the panel on the inside of the girdle or circular enclosing body and it is supposed to be pulled away from that when the crotch is tensioned and, of course, you can see that that just—

The Court: You take time, Mrs. Erteszek, to look at that whole passage. You think about it and see if you understand it.

(Pause.)

Mr. Taylor: Your Honor realizes that the torso encircling body is the girdle portion of the garment, your Honor.

Mr. White: The insert in the patent is 5, soft (283) fabric insert 5, column 1, line 48 in Exhibit 5.

The Witness: 5 is the crotch.

Mr. White: I am talking about the lexicography of the patent. In column 1, line 48, it refers to 5 as the soft fabric insert and the panel is called the reinforcing member, as I recall that patent.

The Court: I think that is what she said. She said that the insert is the piece of fabric around the crotch. She said that.

Mr. White: But look at Figure 3, your Honor. A lawyer wrote this and he had in mind the drawings

as well. You see, 5 is pulled in when you put the garment on.

The Witness: When the garter is attached, the crotch moves inwardly.

Q. Away from the girdle? A. Away from the girdle. And this could probably be illustrated best when she sits down. The tension applied downwardly by the crotch portion, that is pretty obvious.

The Court: The insert would be pulled inwardly away from the torso encircling body means that it would be pulled in and away. That is obvious, isn't it?

The Witness: Yes.

(284) If your Honor allows her to sit down you might be able to see that.

This is loose and the crotch is then just encircling her body. That is the best that I can interpret it.

Mr. Taylor: You see, if you realize, if your Honor please, that the stitching alongside the panel which is on the inside is the point at which the phrase here explains is pulled inwardly away from the girdle portion, so that it just doesn't make sense.

The Court: I don't know why it doesn't make sense.

Mr. Taylor: If it can't be demonstrated-

The Court: What the witness is saying is that the insert is the little piece of fabric that runs from the stitching down over the crotch or under the crotch and if tension is applied downwardly at this point that insert will be pulled in, in other words toward the body, and it will be pulled away from the girdle portion. That is exactly what we see happening here.

The Witness: It does.

Mr. Taylor: You see, the trouble is the encircling body is the girdle and not the human body, you see, so that what this argument means is that it is being pulled (285) away from the girdle portion when there is a tension or pulling on the crotch.

The Court: Right.

Mr. Taylor: That, of course, can't happen because it is sewed along the lines of the garment that we see here on the model.

The Court: I think it is exactly what is happening.

We don't need to have an argument here, but there is pressure being applied to pull inward this girdle portion at this stitching point. Isn't that exactly what we see here?

Mr. Taylor: No, I don't think so.

The Court: It is what I see. You correct me if I am wrong.

What else could happen? I mean, you have the stitching at a certain point and at that point the crotch insert goes off, when there is pressure on the crotch insert it simply pulls at that stitching, it pulls the girdle thing and pulls it in.

Maybe Mrs. Erteszek or the young lady can just pull that insert and we will see what happens.

Mr. Taylor: Yes, but you see, that is not pulling on the tension of the crotch, you see, that is just pulling it upwards this way.

(286) The Court: All right, let us go to something else.

A. Well, the crotch is really-

Mr. White: No, Mrs. Erteszek. The Court wants to continue.

Mr. Taylor: Let us continue because it might be helpful.

Mr. White: I have another point to make about this. What Mr. Taylor is questioning Mrs. Erteszek about is, "On the other hand." That is a contrasting statement.

The preceding statement is when you put her construction on a model, the fact that this crotch member is attached to an overlaying panel, the body portion doesn't pull away in that fashion. It seems clear.

The Court: Go ahead, Mr. Taylor.

Mr. Taylor: Let us pass that for just a moment because there is another portion which may help us in our understanding.

I continue on page 21.

"Consequently, the cooperative flattening force which the applicant achieves would not be possible. In addition, it should be noted that Rosenthal member 7 is not said to be elasticized but is only attached by an elastic sized member to the crotch portion. Again, this (287) minimizes the capacity of Rosenthal's structure to function in the desired manner which has just been described.

I can understand that there is some tension applied to the crotch portion extension, but how it pulls it away from the girdle portion, I don't see how it can happen because of the stitching along the sides of the girdle which affixes the panel to the inside of the girdle portion.

The Court: Okay, we have observed what we are able to observe.

Now go ahead with your questioning.

Q. Let us look at page 17 of this same document and I want you to tell me whether or not you agree with the

examiner's characterization, namely, this reference which shows an elasticized under garment—

Mr. White: He is talking now, Mrs. Erteszek, about the patent of Exhibit 5.

Q. This reference, which shows an elasticized under garment—

Mr. White: That is patentee's prior art patent.

Q.—and comprising a torso encircling body and a front panel 7 having side edges sewn to said body along extents running from the body waist downwardly to locations spaced above the bottom edge as shown in Fig. 3 and the (288) panel having lower side continuations of said upper edges and extended free of attachment to the body—now, the important portion—the inclusion of a front panel overlying the front of the body involves merely a simple expedient of choice. This would be an obvious reversal of arrangements.

My question to you, Mrs. Erteszek, is, did you ever construct a garment in which the Rosenthal structure was reversed by making the panel on the outside and affixing it to the crotch portion?

Mr. White: I object to that question as utterly incomprehensible even to me, let alone a lay person.

He has introduced by a long quotation from a document and now asking her about something did she ever make something.

Furthermore, this is a statement, your Honor, by the Patent Office examiner who is examining the application and he is now writing this back.

The Court: Objection sustained. Let us have a question.

What is your question?

Q. My question is this: Did you ever construct a garment making use of the disclosure and arrangements illustrated in the figures of Rosenthal patent Plaintiff's Exhibit (289) 5, but having the panel 8 on the outside of the girdle instead of on the inside as shown in the patent Plaintiff's Exhibit 5? A. No, I have never done that.

Q. In your opinion, would it result in an operative garment? A. No.

Q. Why not? A. Because the skirt does not work on the outside would equally be uncomfortable on the inside.

Q. Why would it be uncomfortable on the outside if it is not uncomfortable on the inside? A. You reversed my statement.

I said it would be just as uncomfortable inside as it is on the outside.

Just by looking at the garment you can see that this is not a comfortable garment with the way the overlap, wrinkles, at the mere movement of the body it will roll up and cause problems to the wearer.

Q. If you have never built a garment in which the panel of Rosenthal, Plaintiff's Exhibit 5, is arranged on the outside instead of the inside, how would you know that this defect that you have just described exists? A. Mr. Taylor, I have been designing garments (290) for over thirty years and there are some basic things which are familiar to me without even having to test them.

Q. All right. I will ask you this question.

Have you ever constructed a garment as in your patent No. 3,142,301, with the panel on the inside? A. Yes, I have.

Q. And is that an operative and satisfactory garment? A. It has proven not fully satisfactory. That is the reason why I went to the following—I followed it up by adjusting the bottom skirt in such a manner, in a half crotch, so that there wouldn't be any slippage.

Q. Am I to understand that the girdle of Plaintiff's Exhibit 1 as illustrated in the patent was not a satisfactory garment?

Mr. White: Wait a minute.

The Court: Sustained.

Mr. White: I object to that, your Honor. But I would like to have the preceding question read, because I am not sure that I understood it.

The Court: Let us have the preceding question and answer.

Mr. White: Listen carefully to that question as it is read.

(291) (Record read.)

Q. Then are you saying insofar as the structure of Plaintiff's Exhibit 1 patent, the 301, that there was something to be desired in the improvement? A. That was the original first patent, I understand.

Q. Did you ever manufacture-

Mr. White: It is obvious, your Honor, that Mrs. Erteszek doesn't understand that question.

Mrs. Erteszek, the question was, did you ever make a garment like your patented 1 only instead of having the panel on the outside of the skirt you put it on the inside?

The Witness: That's what I did.

Mr. Taylor: Sure, she just said that.

The Witness: That is what I just answered.

Q. That was unsatisfactory, is that what you are saying? A. It was an improvement over what has to be heretofore, but it wasn't fully satisfactory to me, therefore, I tried to improve it.

Q. And why was it that the panel arranged on the inside in the patent Plaintiff's Exhibit 1 was at least somewhat operative while you contend that the Rosenthal (292) patent disclosure, Plaintiff's Exhibit 5, was completely unsatisfactory? A. Because, as you can see in the design of—

Q. You are referring to Fig. 2 of Plaintiff's Exhibit 1? A. Fig. 2, yes.

Q. Go ahead. A. The lower part, the oval as it is in this particular garment, is unattached in the front part underneath so by the wearer's walking for a certain amount of time it would tend to slip up slightly. It would work very well with garters.

The Court: If the panel were inside?

The Witness: If the panel were inside or outside, for that matter—that does not make any difference—the minute there is a loose panel like that in a girdle, it can walk up.

The Court: And that would happen if you had the panel inside or outside?

The Witness: Or outside, it would not make any difference.

The Court: And that is the reason you went to 301, you put the crotch piece attached to the—The Witness: to the inside part.

(293) The Court: To the girdle part, right?

The Witness: That is correct.

The Court: I think we will have to adjourn. I still think I have a short criminal trial tomorrow. Let us go off the record for a minute.

(Discussion off the record.)

The Court: We had a little off the record discussion about burden of proof and am I correct, Mr.

Taylor, that you concede that you have the burden of proof to show that the development here was obviously within Section 103?

Mr. Taylor: That is correct.

The Court: What is the reference you have, Mr. White?

Mr. White: Title 35, U.S. Code, Section 282.

Would you like part of it read?

The Court: Yes.

Mr. White: "A patent shall be presumed valid. Each claim of a patent, whether in independent or dependent form, shall be presumed valid independent of the validity of the other claims. Dependent claims shall be presumed valid even though dependent upon an invalid claim."

Does your Honor understand all of that? (294). The Court: I will look at it tonight.

Mr. White: The next sentence is the important one.

The Court: I will tell you I will study that. There is no need to read it.

Mr. White: You stopped me just when I got to the one sentence.

The Court: All right.

Mr. White: "The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting it."

Mr. Taylor: And plaintiff in a declaratory judgment has that burden.

The Court: Off the record again.

(Discussion off the record.)

(Adjourned to February 1, 1973, at 10 a.m.)

(295) New York—February 1, 1973 10:00 a.m.

(Trial resumed.)

Mr. Taylor: Your Honor, would you like to have the witness state with respect to the number of 40-28's that were boxed and sold at the outset? I think that was one of your inquiries made at the close of the other hearing.

The Court: Are you ready to give us that information?

Mr. Taylor: Yes, I am.

The Court: Just as long as I know you are ready. I think we can go ahead with the witness and we will come to the proof on damages later.

Mr. Taylor: I would like to hand up Plaintiff's memo on the issue of infringement.

The Court: All right. I appreciate your compilation of cases on the issue of garment patents and I have read those. Then this morning, I received a similar compilation (296) from the defendant, which I still have to read.

Mr. Taylor: I gave a copy of my compilation to Mr. White the other day.

The Court: Then I have memos from both sides on infringement and damages.

Olga Erteszek, resumed.

Continued Direct Examination by Mr. Taylor:

Q. Mrs. Erteszek, you recall that I examined you on pretrial proceedings in Pasadena, do you not? A. Yes, I do.

Q. And in the course of that testimony which you gave,

I exhibited to you a garment which in the course of the deposition was marked Plaintiff's Exhibit 3 and the garment was made by Vanity Fair.

That is correct, isn't it; in your recollection? A. May I

see it?

Q. Surely (handing). A. I am not aware of who made it, but this was a garment made according to my original patent.

Q. Yes. That is the 301 patent. A. Yes, that is a copy

of my patent.

Q. Plaintiff's Exhibit 1? A. That is correct.

Q. Why is it that you didn't supply me with an example of the actual brief which was made by the Olga Company? A. I'm not aware that we had anything of this kind at this particular moment, because this garment was made for a previous period of time. It has proven that it needed some additions which we subsequently added and the second patent was issued.

Q. Let us restrict our attention to Plaintiff's Exhibit 1,

the 301 patent, for the moment.

I will ask you to state, what was the difficulties that were encountered in the trade or in your own opinion with respect to the garment of Plaintiff's Exhibit 1 patent 301 as exemplified in the garment which is here identified as Plaintiff's Exhibit 15? A. This, your Honor, was the first step toward my original idea that I wanted to achieve in the garment.

Like everything else, there are further procedures. You do it, you see that it is good, except you are going

to improve it if you see any kind of deficiencies.

If I could demonstrate it on the model, perhaps, I could show it to a greater advantage.

Q. But in any event, Mrs. Erteszek, there were criticisms made in the trade and, to your knowledge, by others

(298) who became familiar with Plaintiff's Exhibit 15, isn't that correct? A. No, I'm not aware of that. As a matter of fact, I'm not aware that it was available to the trade.

Q. So it was never sold? A. That I couldn't tell you for sure.

Q. Wasn't it referred to in your catalogue that was distributed to the trade?

Mr. White: When?

Mr. Taylor: I think you have the page of the catalogue.

I will skip it. I don't have it.

I checked all the exhibits the other night on Tuesday, but I didn't find that amongst the—

The Court: Which exhibit is that, Mr. Taylor?

Mr. White: What is the number of it?

Mr. Taylor: Exhibit 22.

The Court: Can I see the exhibit for just a minute?

Mr. Taylor: Surely (handing).

The item is 446, if your Honor please.

The Court: Could you identify further what that is? You introduced it in evidence.

Mr. Taylor: Yes.

The Court: It is in evidence in part, but maybe you (299) could bring out, again, what it is.

Mr. Taylor: Yes. I am going to ask Mrs. Erteszek. The Court: All right.

Q. Will you look at the document which I have now placed before you, Mrs. Erteszek, Plaintiff's Exhibit 22, and tell me what it is? A. I am not really sure whether this describes that one or the further development of that.

Q. You said that you were going to demonstrate it on the model. A. Yes.

Q. Will you please do so and point out-

The Court: Let me interpose. I am sorry to interrupt.

Is that a page from an Olga Catalogue?

The Witness: Yes, it is.

The Court: And what Olga Catalogue is that?

The Witness: Your Honor, I can't be sure. Is this the date of the catalogue?

Q. No, that was the date of the deposition of Mr. John Erteszek.

Mr. White: What was the deposition date? The Court: Does anybody know what this Ex-

hibit 22 is?

(300) Mr. Taylor: While they are looking for that, can't we proceed to get the model engaged with the girdle, please?

The Court: If you would be good enough to inquire at some point or maybe you can stipulate what that document is, whether it, in fact, refers to patent 301 or 300, and whether 301 was actually put on the market.

Those are questions that would be of interest to me.

Mr. Taylor: All right. I think we can cover the first one rather rapidly, and that is this.

Q. Was the 301 patent, Plaintiff's Exhibit 1, garment here as Plaintiff's Exhibit 15, was that put on the market? A. Now, Mr. Taylor, this is something that I really don't have very much of a recollection.

I, you see, have been mostly cooped up in the Design Department, and—

The Court: If you don't know, is there someone from the business end of the business who is here?

Mr. Taylor: Mr. John Erteszek, is he here?

The Witness: No.

Mr. Taylor: He was to be.

The Court: We will drop it. If you don't remember—

The Witness: I know if it was, it was a very (301) short time, because I always tend to improve the existing garment.

Q. In other words, the garment was unsatisfactory, in your opinion; is that correct? A. In my opinion, but then I am somewhat of an idealist. I like to do the best I can and I keep constantly improving on my garments even if they do sell well.

Q. Will you now proceed to point out the deficiencies in the garment? A. Well, may I please start with the high point of it and—

Q. Do you understand my question? A. I do.

Mr. White: She is answering it, Mr. Taylor. Give her a chance.

The Witness: I do.

If it is all right with you, your Honor, I want to stress the purpose of the garment that I wanted to achieve.

Before this garment, there were different briefs on the market, so-called briefs—

Mr. Taylor: If your Honor please, can't we instruct the witness to just pay a little attention to my question so we get to the—

The Court: Yes. The case is coming in a little bit (302) out of order, probably, as it might seem to you. Your opponent is examining you now and he is asking certain particular questions, and he has a right

to do that. So I think you better stick to his questions and your counsel will have a right to examine you and go over the whole subject matter of the design and purpose, how the garment was designed from start to finish.

But right now, there are some things Mr. Taylor wants to bring out and just stick with him. All right? The Witness: Very well.

Mr. White: But I think, if your Honor please, the question is what was unsatisfactory and how can she say what is unsatisfactory unless she is allowed to say what it was she was trying to achieve.

If she can skip that, so be it.

The Court: I think we will let her try.

All right.

You try to limit yourself to Mr. Taylor's questions. That is the most efficient way to get at it. Then Mr. White can talk through everything that you and he want to go through. All right?

What were the deficiencies of the garment?

The Witness: As long as the model was standing or the wearer was standing without exercising or doing the normal movements of the body, the garment was perfectly (303) satisfactory, except sitting down, it turned out underneath the skirt part of it would tend to roll up. This part I call the skirt.

The Court: All right, the skirt part would tend to roll up.

The Witness: In the front. It would roll up and, therefore, causing some kind of discomfort, which could be eliminated with garters pulling it down.

The Court: Go ahead, Mr. Taylor.

Q. Is that the reason why in your patent, Plaintiff's Exhibit 3, which I now exhibit to you, number 300, you show

garters on the garment, whereas in the 301 patent, Plaintiff's Exhibit 1, relating to the girdle Plaintiff's Exhibit 15 now worn by the model, there are no provisions for garters—or are there? A. No, that is not the reason for it.

Q. Why did you leave off any illustration of garters in the 301 patent, Plaintiff's Exhibit 1? A. This might have been an omission on the part of the illustrator.

The Court: The garment that the model is wearing is based on the 301 patent, right?

The Witness: Yes.

The Court: And it was a mockup that was built by (304) Vanity Fair for this litigation, right?

The Witness: That is correct.

The Court: It does not have any garters?

The Witness: It does not show any garters on the design

The Court: Right. And there are no garters on

the garment, are there?

The Witness: There are. Eventually, we did add, because, as I mentioned before, your Honor, I have always tried to strive for betterment of the garment. Rome was not built in one day, neither was a girdle, in my opinion. So as I made the garment, I tested it both myself and on the models, it became apparent that it could be worn wthout garters, but it would be more comfortable with attaching the garter to it.

The Court: Was the addition of garters one improvement that you made in the 301 garment in the design?

The Witness: That was the first step toward the improvement.

The Court: All right, Mr. Taylor.

I would like to have all the patents in evidence and also Plaintiff's Exhibit 2.

Mr. Taylor: I think I can give those to you from my collection right here.

(305) Q. Will you direct your attention to Plaintiff's Exhibit 16, which is the Olga garment, and tell me whether or not the provision for garters on that garment was made in accordance with your explanation just given in respect to Plaintiff's Exhibit 15?

Mr. White: Can you show her one?

A. Do I understand you correctly that you want to find out whether the garters were necessary for the functioning

of the garment?

Q. No, I just want to know why you put them on that garment in the light of your explanation with respect to Plaintiff's Exhibit 15 garment. A. Because this was a two-fold garment, a garment which I was very safe about recommending to be worn without garters. There were obviously women who wore hose and preferred to have the hose pulled up by garters, so they were given a choice by a detachable garter.

Q. Isn't it a fact, Mrs. Erteszek, that in the Maidenform advertisement here as Plaintiff's Exhibit 14, that the same provision is made in connection with the Maidenform garment, which is Defendant's Exhibit A? A. The same provisions have been made as far as the garters are con-

cerned, but not the same function will be achieved.

(306) Q. We had a discussion yesterday about the Maidenform garment, Defendant's Exhibit A, with respect to the advertisement which appeared in Brassieres & Corsets for April 1955 here as Plaintiff's Exhibit 14, and I think I have a clear copy, and I wish you would observe there and see if that isn't provided with the same type of detachable garter connection as is present in Plaintiff's

Exhibit 16? A. Mr. Taylor, I am afraid that you don't understand what I am trying to explain.

The Court: All he is asking you, Mrs. Erteszek, is, if you can tell from this picture—I think we should have it marked—but can you tell from this picture whether the Maidenform garment pictured here has detachable garters or not. Can you tell?

The Witness: Yes, they do have detachable gar-

ters.

The Court: That is all he asked you. This is a lot better than the Exhibit 14.

Mr. Taylor: May I offer that in evidence as 14A.

The Court: All right, 14-A. Mr. White: No objection.

(Plaintiff's Exhibit 14-A was received in evidence.)

Q. Let us continue with respect to the deficiencies of the garment, Plaintiff's Exhibit 15 now worn by the model. Are there any other deficiencies that you wish to call (307) attention to? A. None that I could see at that particular time, nor at this time.

The garment stays on the body perfectly, except for the little discomfort which might or might not occur, depending on the type of a figure that it is worn on. It could have been with anybody else a satisfactory garment.

Q. But as far as you were concerned and the Olga Company, why, it was never marketed, is that correct? A. As far as I was concerned, it was not fully satisfactory, but then I always strive to do something better.

Q. Looking again at the Maidenform advertisement, which is now in the clear copy identified as Plaintiff's Exhibit 14-A, when did you first become aware of the garment there portrayed? A. As far as I remember, Mr. Taylor, the first time I saw it is at the deposition.

Q. Does the Olga Company maintain a collection of competitive garments and collected generally about the time of their appearance on the market? A. We do, as do all the other firms do.

Q. Yes. It is a general practice in the industry, is it not? A. Yes, it certainly is.

(308) The Court: What is the date of that ad? Mr. Taylor: April 1955.

Are you missing something that is in the way of patents?

The Court: I just want to refresh my recollection as to the chronology.

Mr. Taylor: The 301 patent was filed in 1962, as appears—

The Court: Both the 301 and 300 were granted in 1964.

Mr. Taylor: On the same date.

The Court: You are saying the Maidenform ad is 1955?

Mr. Taylor: That is correct. That is the reason why, of course, it is among our prior art.

The Court: All right, go ahead.

Q. Now, will you tell the model wearing the Olga garment, Plaintiff's Exhibit 16 and leave, of course, the garters unattached to the leotard. A. That is the purpose of it.

Q. Now, will you have the model go through the same positions that you did.

Mr. Taylor: The your Honor quickly look at this because it is important for us. The wrinkles occur in about the same place in Plaintiff's Exhibit 16 as they did in the (309) garment Plain-

tiff's Exhibit 15.

The Court: I am sorry, I wasn't focusing on the wrinkle on Plaintiff's Exhibit 15.

Mr. Taylor: Maybe we better put that on again.
The Witness: May I draw your Honor's attention—

Q. Just a minute, Mrs. Erteszek.

The Court: You are pointing to the wrinkles up in the middle of the garment?

Mr. Taylor: That is right, yes.

The Court: Would you mind putting Exhibit 15 on again?

Mr. Taylor: You will note, if your Honor please, that they occur in about the same place under the same conditions when the model is seated.

The Witness: Your Honor, may I explain? I don't know. You will have to forgive me. This is the first time in court for me, and I don't know the proper procedure.

The Court: Don't worry about it.

What about those wrinkles in 15? That was not the wrinkle. You were talking about a rolling up at the bottom of the skirt.

The Witness: Exactly.

The Court: And you are now pointing out, Mr. Taylor, some wrinkles in the middle.

(310) Mr. Taylor: The same wrinkles occur in both garments.

The Court: We had testimony before about a rolling up at a different spot.

What about the wrinkles Mr. Taylor has just pointed out?

The Witness: This is just apparently too big a garment, too large a garment for her, or else she

really does not need it. Let's face it, she has a model's figure and whenever there is a little surplus flesh, the garment works in a controlling way.

The Court: Did this garment come in different sizes?

The Witness: Indeed, it does.

The Court: If it was the proper size and right for the wearer, would that kind of wrinkling we see occur?

The Witness: Now, we are not talking—are we talking at this point about these wrinkles?

The Witness: We are talking about that wrinkle, yes, about half-way up the garment. In the outer part.

The Court: Right.

The Witness: No, that wouldn't appear in a garment which would be suited size-wise to her figure.

The Court: All right.

(311) Q. And that, of course, would be eliminated with garters, would it not? A. Not necessarily, no.

Q. Let us not say not necessarily. I am asking you a question.

Mr. Taylor: Now, will the model stand up, please, like we did before. That straightens it out, doesn't it?

Mr. White: I don't think she had it standing up the first time.

The Witness: Excuse me. Would you stand up without pulling the garters. There are no wrinkles apparent without the garters.

Q. What criticism did you make of that? Let us again rephrase or retrace our steps so that it may be clear to the

Court. A. Fine. My criticism of this garment is that it pulls up underneath and eventually, would ride up far enough to create a discomfort to the wearer.

The Court: Would it turn up or ride up?

The Witness: Whichever. It might turn or ride, depending on the movements of the body. But whichever way it will be, it will bunch up and by that cut right into the flesh.

The Court: Is it proper to call it the skirt?

(312) The Witness: Skirt indeed.

The Court: When we say skirt, we are talking about what?

The Witness: We are talking about the underneath part of it.

Mr. Taylor: The girdle portion.

The Witness: If we did away with the upper part, there would be just a skirt underneath.

The Court: Is the skirt the whole girdle portion? Is that another name?

I have to get my terms straight. What is the skirt?

The Witness: The skirt is the part of the garment which encircles the—

Mr. Taylor: Torso. Mr. White: Midriff.

The Witness: The midriff without any support of any kind.

Mr. Taylor: In other words, a girdle, if your Honor please, just to get these terms down to simple ones.

The Court: You are saying because the skirt here was not anchored or pulled down in any way, it can ride up?

The Witness: Exactly.

The Court: It could either roll up or it could (313) create a wrinkle?

The Witness: Exactly.

The Court: I think I have that, Mr. Taylor.

The Witness: Would your Honor like to see the other one again?

The Court: I think you started in with the other to see if that same wrinkling appeared.

Mr. Taylor: Yes, let us do that, without the garters being fixed.

The Court: What is your question, Mr. Taylor?

Q. Isn't the fact that you have the same tendency looking at—the only one I can see is this leg over here which is beginning to wrinkle on the girdle portion just as you pointed attention to it on the opposite side.

Would the model please just move the chair around and

turn toward the Court please?

The Court: Is there a question or what?

Mr. Talyor: I say that the same phenomenon or performance occurs with the garment, Plaintiff's Exhibit 16, as occurred in the garment, Plaintiff's Exhibit 15.

The Court: Is that correct? If this garment is used without garters, is there the same rolling up effect at the skirt?

The Witness: No, your Honor, because simply there is no skirt. There is no skirt per se. The underneath part (314) has—can your Honor see clearly—has a pulling which prevents it from rolling up, and you can see it very clearly when she sits back relaxed that there is absolutely no wrinkling at all.

The Court: Because the skirt is attached to the crotchpiece?

The Witness: The skirt has become a part of the panty with the crotch pulling it down.

Q. Now, would you put the garters on that garment, Plaintiff's Exhibit 16, and perform the same movement with the garters attached to the leotards.

Isn't it a fact by the use of the garters, the tendency to ride up or wrinkle as we have described it is eliminated?

A. Not in my opinion, no.

Q. What is your opinion based upon? A. There is a certain pull which affords the garment to go a little lower and, therefore, there is a two-way pull, a pull on the hose and pull down on the garment. The garment rides somewhat lower.

However, this part of the garment is still the same.

The Court: Mr. Taylor, it seem to me—I think I observed what it is. Why don't you go ahead.

(315) Q. Now, let us move to the garment which is here identified as Defendant's Exhibit A, which your Honor will recall was the Maidenform/Rosenthal garment depicted—

The Court: May I just ask one thing:

In the 301 garment, there was a crotchpiece going down from the skirt, right?

Mr. White: The numbers, unfortunately, are inverted. The later version was the 300.

The Court: In the 300.

The Witness: This is the 300.

The Court: In the garment she has on.

There is a crotchpiece going down from the skirt, is that right?

The Witness: That is correct.

The Court: That has some effect of preventing the skirt from riding up, right?

The Witness: In that case, yes.

The Court: What is the purpose of putting the

garters on, these detachable garters?

The Witness: Well, your Honor, there are two ways a woman will wear a garment of this kind. One is for underneath sportwear, like shorts or briefs or mini-skirt, whichever the case may be, without hose. The other one is when she wears hose, she still wants stomach control, which this (316) garment affords her, and she has to have a connection between the garment and the hose. The garters afford that.

The Court: Did the garters provide any additional protection against wrinkling?

The Witness: Not particularly, your Honor.

Mr. Taylor: Your Honor has just observed that.
The Court: All right, I have observed what I have observed.

Q. Mrs. Erteszek, will you direct your attention to the Maidenform/Rosenthal garment, which is here identified as Plaintiff's Exhibit A, and tell me, if you know, why it is that the garter straps in that garment are sewn to the portions of the skirt rather than having a detachable garter such as illustrated in the Maidenform advertisement, Plaintiff's Exhibit 14-A?

The Court: Where did this garment come from?

Mr. Taylor: It was supposedly obtained-

The Court: This comes from the defendant, right? Mr. Taylor: That is from the defendant, that is

right.

Mr. White: From Maidenform by the defendant.
Mr. Taylor: But we have no proof of its authenticity, other than the fact that it was given to Mr.

Coch, so he says, and I don't doubt it.

(317) The Court: We have been through that before.

You didn't design or put out this garment, but do you know why this particular garment has a fixed set of garters rather than detachable? Do you know or not?

The Witness: Now, that would be just a supposition on my part.

The Court: Let us not have any suppositions. She does not know. All right, let us go to the next question.

Q. However, that garment can be work satisfactorily without affixing the garters to the stockings, can it not? A. I don't believe so, Mr. Taylor.

Q. Will you have the model, please, wear the Rosenthal garment, Defendant's Exhibit A.

Will you now sit down and go through the same motions that you did before.

The Court: The question is can it be work successfully without the garters, Mrs. Erteszek?

Mr. Taylor: That is correct.

The Witness: Would you like my opinion on that? The Court: That is right.

The Witness: I believe that there is a piece of dead fabric in the front which does not do anybody any good. To the contrary, it certainly couldn't be worn under any form- (318) fitting garment because it would create a wrinkle.

The Court: We have already been through this with your own witness, and he said it isn't satisfactory. I don't know why we have to have it again.

Mr. Taylor: I thought it would be wise to put it in the same tempo with the other garments that have been demonstrated here.

Q. Will you affix the garters to the leotard now and then sit down again as you did without the garter.

The Court: What is the question?

Q. Is that a satisfactory garment the way it is fitting on the model? A. Not in my opinion. I am under oath. I couldn't say otherwise.

The Court: He has asked you and I guess you have answered. Go ahead, what is the next question?

Q. Now, I am going to move on to 300 patent. We have been over the 301.

Mrs. Erteszek, yesterday I directed your attention to the so-called history of patent No. 301 here identified as Plaintiff's Exhibit 2. A. I recall.

Q. Now, I wish to direct your attention to the patent Plaintiff's Exhibit 3, three, one four two, 300, and I (319) will ask you to state whether or not that is a patent granted to you on an application which you filed in 1963.

The Court: I think it is agreed by all sides it is. Mr. Taylor: I haven't had Mrs. Erteszek identify it.

If we can stipulate it is, why, I won't have her— The Court: There is no question about that, is there? Exhibit 3 is patent 3,142,300 by Mrs. Erteszek and the dates that are stated on there is correct, correct?

Mr. White: Everything in there is correct, your Honor.

Q. Now, I would like to call your attention to the file history of the 300 patent, Plaintiff's Exhibit 3, which is here as Plaintiff's Exhibit 4.

Mr. Taylor: Mr. White, to short this up, may we have the same stipulation that we entered into yesterday with respect to 301 that all the admissions and arguments and so forth are correct and that they are binding upon Mrs. Erteszek as the applicant and now the patentee?

Mr. White: Absolutely. Not only Mrs. Erteszek

as the applicant, but defendant in this case.

Q. Now, will you direct your attention, Mrs. Erteszek, to Patent No. DES 174,054, patent on panty girdle, assigned (320) to Gossard which is here as Plaintiff's Exhibit 7.

You have seen that patent before, have you not? A. I have seen this garment before. I don't recollect seeing the patent.

Q. Is this the Gossard garment that you just referred to, and I now exhibit to you the garment here identified as Plaintiff's Exhibit 20? A. Well, not exactly, Mr. Taylor, because the back view, the crotch in the back is coming to a point whereas this one is rounded.

Q. You said that you recognized the garment. When would you say you first saw the Gossard garment, if you know; Plaintiff's Exhibit 20? A. I am sorry, I couldn't recognize that.

Q. Was it some time ago? A. It was some time ago.

Q. Would this be among the garments that would be collected by Olga Company for perusal in connection with competitive products?

> Mr. White: I will so stipulate, Mr. Taylor, if you will stipulate the same thing about Vanity Fair?

> Mr. Taylor: I think we already had testimony on that subject and Mr. Lands has said that he keeps a competitive collection of garments as the industry does.

(321) The Court: Where do we stand on the stipulation? Do you want a stipulation as to the Gossard garment, whether that was part of the Olga collection?

Mr. Taylor: That would be very interesting.

The Court: Mr. White said he would stipulate on certain conditions. How do we stand on that? Is there a stipulation or not?

Mr. Taylor: Yes, it certainly is satisfactory to me to stipulate to save a little time.

Mr. White: So stipulated, both parties had it at on about the time it appeared on the market.

The Court: Both parties had it—the Gossard—Mr. Taylor: The Gossard garment, which is here as Plaintiff's Exhibit 20.

The Court: At or about the time-

Mr. Taylor: It appeared on the market.

The Court: When was that?

Mr. White: We know it was at least since 1955 from Exhibit 14-A.

The Court: That is fine.

Both parties being both plaintiff and defendant, right?

Mr. White: Yes, your Honor.

Q. Mrs. Erteszek, would it be correct to designate the (322) Gossard garment, which is here as Plaintiff's Exhibit 20, as a girdle-panty-garter belt? A. This is a very large title for a little garment. I would just simply call it a brief, elasticized brief. That it is what is known in the industry nomenclature.

Q. Would you characterize the Maidenform garment, Defendant's Exhibit A, as a brief? A. No, definitely not.

Q. Why not? A. Because it cannot function without garters. It is not a brief, it is a regular garter belt, which

means that the belt is dependent fully on the garters being attached to the hose, otherwise, it does not perform its purpose. It is a garter belt with a crotch inserted to it.

Q. Isn't that true of the Gossard garment, that the supporters are affixed to the garment itself? A. No, it isn't,

because the grips are removable.

Q. And wherever you find a removable grip, so to speak, you no longer have a garter belt, is that correct? A. Well, now, Mr. Taylor. We are comparing pears and apples. I really couldn't tell you where the garter belt starts—where the comparison is.

A garter belt is what the name suggests, it is a belt with

garters strictly made for support of hose.

(323) Q. In the Rosenthal patent, Plaintiff's Exhibit 5, which you looked at yesterday, the title is girdle-panty-garter belt. What is wrong with that? A. It is a big title.

Q. Why isn't it equally applicable to, let us say, the Gossard garment? A. Because this is not a garter belt as I explained it to you.

Q. You pointed to, I believe, one of the garters on Plaintiff's Exhibit 20, did you not? Are they all removable or detachable, so to speak? A. Yes, they are all detachable.

Q. And that is true, of course, of the 446 Olga garment, which is here identified as Plaintiff's Exhibit 16, is it not? A. That is true.

The Court: I would like to get my terminology correct and maybe the terminology isn't an exact science here.

I thought we had established at one point pretty well that there are three different kinds of garments fairly well defined. One is a girdle, one is panty girdle and one is a brief.

Are there three categories that you could give those (324) names to?

The Witness: Yes, your Honor, except that there is more leeway, more similarity between a brief and a panty girdle.

The Court: What is the difference between—I don't want to interrupt you, Mr. Taylor, but it will help me to go over it.

Mr. Taylor: It is fine. I wish you would.

The Court: What, in your view, is the distinction between these three things?

The Witness: A garter belt-

Mr. White: No, Mrs. Erteszek, those were the three things the Court is asking you about.

The Witness: A girdle, a brief and a panty girdle.
A girdle is a—now I have to think a moment to word it correctly.

A girdle is a garment which encircles the body with the purpose of correcting or—

The Court: It does something to the figure? The Witness: Correcting the figure, yes.

The Court: Then we come to the panty girdle.

The Witness: But in most cases, may I add to it, please, in most cases, it can be worn comfortably only when attached to a hose. In other words, it is crotchless.

(325) The Court: Now, the panty girdle.

The Witness: A panty girdle is a garment to suit a similar purpose, except having a crotch which prevents it from riding up and, therefore, could be worn with or without hose and depending on the length of it, it is called either long-legged panty girdle or brief.

The Court: Does a panty girdle usually have some degree of leg?

The Witness: A panty girdle as it is known, yes, it has some degree of leg. The length of it, of

course, depends on the necessity for which it was designed.

The Court: And the brief?

The Witness: And the brief is a panty girdle—a leg-less panty girdle.

Mr. Taylor: And a garter belt?

The Court: You had garter belt. What is a garter belt?

The Witness: A garter belt is just a piece of fabric, any kind of fabric, whether rigid or elasticized, which depends fully on the garters attached to the hose in order to hold it down, otherwise, it would roll up.

Mr. Taylor: May I interrupt there?

The Court: Certainly.

Mr. Taylor: I have a garment here which is a garter belt, and I might ask Mrs. Erteszek to define it and (326) then your Honor will see exactly what the garment looks like.

Mr. White: May I see it?

Mr. Taylor: Surely.

The Court: Is it marked for identification?

Mr. Taylor: No, it hasn't been. I am going to have it marked now.

Mr. White: No objection.

Mr. Taylor: There is no objection, so may I mark it in evidence?

Mr. White: I trust you will say where and when you got it just for the record.

Mr. Taylor: It is a garter belt which was produced by Vanity Fair.

Mr. White: I mean, now, some current thing?

Mr. Taylor: I couldn't answer that question right off the bat, but it is a garment which was sold quite extensively.

Mr. White: Ask Mr. Lands. I just want it in the record.

Is it an ancient thing? Is it prior art or not? Let us get that clear.

Mr. Lands: Somewhere in the sixties. I don't know when. It is not currently on the market.

(327) Mr. White: That is satisfactory.

The Court: You are introducing it solely as an example of a garter belt?

Mr. Taylor: That is right.

The Court: It is not prior art?

Mr. Taylor: No, because we have that, of course, in the other garments.

I ask that this be marked, then, in evidence as Plaintiff's Exhibit 38.

Mr. White: No objection.

(Plaintiff's Exhibit 38 was received in evidence.)

Q. Mrs. Erteszek, I show you a garment which is here identified as Plaintiff's Exhibit 38, and I will ask you to characterize it. A. It is a combination of garter belt panty, and I should know because I made it many, many years ago.

Q. It is essentially a garter belt, isn't it? A. In this respect, that the garters attach to it—no, no, I would consider it a garter belt panty combination.

Q. Now, this is a different category all together, because a garter belt would be a thing like this without the crotch holding it down. A garter belt has no crotch.

The Court: Is a garter belt's main function simply (328) to hold up garters which, in turn, hold up stockings?

The Witness: Yes, your Honor, exactly.

The Court: And a garter belt as such usually does not have any support girdle feature, is that right?

The Witness: Well, there have been some done in different ways.

Now, for example, at one time, something of this order was on the market.

The Court: That is the Rosenthal.

Mr. Taylor: That is the Rosenthal garment, yes. The Witness: Without the inside panel. That was called apron front garter belt.

The Court: In other words, you could combine the features? If you want to have a garment that has a function of holding up garters and also giving some abdominal support, you can do it by combining features, I take it?

The Witness: That is exactly true.

The Court: And that is that Rosenthal item, right?

Mr. Taylor: Yes. It was a triple-threat, so to speak, in the title. I am getting back to my football days.

The Court: I appreciae the definitions. I think that cleared it up.

Q. I show you, Mrs. Erteszek, a patent which is numbered 2,663,871, here identified as Plaintiff's Exhibit 8 (329) and I will ask you to state first, is this a patent which was granted to you? A. Yes, sir, it was.

Q. And you devised the garment that is illustrated in the figures of the patent 1 to 5? A. Yes, I did.

Q. Will you say what the nature of the garment is illustrated in figure 5 of the patent, Plaintiff's Exhibit 8? A. Figure 5 is a panty girdle, a companion to the original figure 1 girdle or figure 2, whichever the case may be.

Q. I believe you characterize figure 5 as showing a variational form of the invention, is that correct? A. I am sorry, I don't understand the expression.

Q. Was it a variation of Figure 1, the girdle?

Mr. White: Your Honor, it states it.

Mr. Taylor, to aid Mrs. Erteszek, if you could point to the line, it would help.

Column 2, line 10 says: "Figure 5 is a view showing a variational form of the invention."

Q. So that in this patent, you represented that the panty girdle of Figure 5 was a variation of the girdle shown in Figure 1, is that correct? A. Apparently so, yes.

(330) Q. I note in Figure 2 that it shows that the front of the girdle which you, I think, just previously designated as the skirt, is higher at the front than it is at the back, is that correct? A. That is formerly the procedure, or else it would—the woman couldn't walk if the back was as low as the front.

Q. I will ask you by reference to-

Mr. White: I think she misspoke, your Honor.

The Witness: Pardon me?

Mr. White: I think the witness misspoke. She said if the back was as low as the front.

Mr. Taylor: No, she said it exactly right.

The Witness: If the front was as low as the back, that is what I meant.

Q. Now, I show you a patent numbered 2,872,927 to Olga Erteszek here identified as Plaintiff's Exhibit 9, and I will ask you to state whether or not you are the Olga Erteszek who was granted that patent. A. Yes, I am.

Q. And you devised the garments as illustrated in the several figures of the patent? A. Yes, I have.

Q. And this patent emphasizes the idea that you have (331) just referred to of making the girdle cut up higher in the front than it is in the back, isn't that correct? A. That is correct.

Q. In Figure 3, you show a panel which assists the girdle and its effect on the torso, do you not? A. Are you referring to the back panel showing in it?

Q. No, I am referring to Figure 3, which is the front,

and the panel is 16. A. Yes.

Q. Will you tell me in reference to Plaintiff's Exhibit 16, the Olga girdle 446, whether that is cut high in the front in the garment I have just exhibited to you? A. Mr. Taylor, we are, again, comparing two completely different categories.

This is a skirt girdle. Patent No. 2,872,927 is a skirt girdle, whereas this is a brief or a panty girdle. It works differently.

Q. Isn't it a fact that in the descriptive portions of the patent, it is the skirt or girdle portion which I have referred to is actually referred to as a torso encircling body which, of course, is another rather fancy name for a girdle? A. Well, isn't that—I have to read it because I haven't seen it.

(332) Mr. White: So stipulated. Mr. Taylor: It has been stipulated.

Mr. White: Except for the characterization, it does refer to a torso encircling body portion.

Q. And the torso encircling body portion in Plaintiff's Exhibit 16 is cut higher in the front as illustrated in the girdle structure of the patent, Plaintiff's Exhibit 9, is that correct?

The Court: I don't understand it.

Mr. Taylor: It is perfectly simple, your Honor.

Here is the girdle portion of 446.

The Witness: No, that is not the girdle portion. I am sorry to interrupt.

- Q. What do you call the torso encircling portion of this garment? Isn't that the girdle portion? A. Well, if you want to refer from here to here.
 - Q. Exactly. A. Then that is all right.
 - Q. That is the girdle portion? A. All right.
- Q. And that girdle portion is cut higher in the front than in the back? A. That is correct.

The Court: Mr. Taylor, that is obvious. I mean, (333) we can look at Exhibit 1, we can look at Exhibit 3 and both show a side view.

Mr. White: Mr. Taylor, you also realize it is not cut as high as Exhibit 9 shows, for whatever that is worth.

Mr. Taylor: How high is high?

Mr. White: I don't know, but the question was as shown in Exhibit 9.

Mr. Taylor: Doesn't that emphasize the—I don't want to argue with counsel. I am sorry.

The Court: These are matters in evidence and you can argue them to me. I think they are pretty clear.

Q. Now, I exhibit to you patent numbered 2,531,772, which is here identified as Plaintiff's Exhibit 10.

Are you the Olga Erteszek that was granted that patent? A. Yes, I am.

Q. And you devised the structures of the garments shown in the figures of the patent? A. Yes, indeed.

Q. Does this patent show a flexible crotchpiece as a part of the panty girdle? A. I would like you to explain to me what do you mean under flexible?

This, we call detachable. That was the first of (334) its kind where a woman could unlock the crotch for sanitary reasons.

Q. I will pass that for just a moment.

I also call to your attention patent number 2,660,173, granted to Olga Erteszek, which is here identified as Plaintiff's Exhibit 11, and my first question is, are you the Olga Erteszek to whom the patent was granted? A. Yes, I am.

Q. And you devised the garment which is illustrated in

the patent figures? A. Yes, I did.

Q. Does it show a flexible insert, crotch insert? A. Again, I didn't understand your previous question.

The Court: What exhibit are we talking about?
Mr. Taylor: Plaintiff's Exhibit 11, which is patent No. 173.

The Court: Go back over this 11, Mr. Taylor.

Mr. Taylor: I just asked her whether or not the crotch insert was flexible.

The Witness: I didn't understand what you meant under flexible in the other one, so if you will be kind enough and explain it to me—

The Court: Do you mean stretchable or flexible? Mr. Taylor: I don't know how to express it. Flexi-(335) ble certainly is a well-known term.

The Court: Cloth is always flexible, isn't it?

Mr. Taylor: Not necessarily.

Mr. White: Cloth?

Mr. Taylor: You take heavy denim, it almost stands up.

The Court: Is there any contention this is made of heavy denim?

Mr. Taylor: No, no. But you see this has to do with the language of the claim which I should like to read to your Honor in Plaintiff's Exhibit 1 in patent No. 301.

Mr. White: One, Mr. Taylor, is 300.

Mr. Taylor: I beg your pardon, 300. I am sorry. The Court: Plaintiff's Exhibit 1 is patent 301.

Mr. White: No. 300.

Mr. Taylor: I want to refer to 300, which is Plaintiff's Exhibit 3. I am sorry, your Honor.

The Court: All right, Plaintiff's Exhibit 3.

Mr. Taylor: The particular phrase which includes the word "flexible," appears at Column 3, line 10, and it reads, "And a flexible crotchpiece attached to a front central bottom edge of the elastic fabric body," which is attached to the girdle, of course.

My question to Mrs. Erteszek-

(336) A. Now, I understand your question, and I can answer it.

Flexible in this particular case means elasticized so that it stretches.

Mr. White: No, your Honor, I am sorry; I have to interrupt Mrs. Erteszek. She is not pointing now—

The Court: I would not interrupt her. Now let her finish. This is questioning. You will have an opportunity to cross or object, but not interrupt.

Mr. White: I am sorry.

The Court: You started to answer what you now understand what flexible means.

The Witness: May I read it over again?

The Court: May I have the answer over and you continue your answer.

The Witness: May I read it over once again?

The Court: Yes.

Q. Oh, surely, go right ahead.

(Pause.)

The Court: Read the answer before the interruption, and then you complete your answer. All right?

The Witness: Yes. Thank you.

Mr. Taylor: I think maybe we better ask the question, if your Honor please. Read the question again, please.

(337) (Record read.)

The Court: Is that the end of your answer?

The Witness: Well, I could best show it that the—

The Court: You have in your hand Exhibit 16, right?

Mr. Taylor: 16 is right, yes.

The Court: I am just keeping the record straight. The Witness: Part of the crotch moves, and therefore, in my understanding, layman's language, that is flexible. It moves.

The Court: There are two crotch pieces in Exhibit 16, an inside and an outside?

The Witness: That is right.

The Court: And both can be flexed, right?

The Witness: That is correct.

Q. I call your attention to Patent 2,732,556, here identified as Plaintiff's Exhibit 12, and I will ask you to state whether or not the crotch portion in that patent as illustrated in the figures and described is a flexible crotch portion in the manner you have just demonstrated by reference to Plaintiff's Exhibit 16?

The Witness: You will forgive me, your Honor, I have to be able to read it through.

(Pause.)

The Witness (continuing): Yes, this also is a flexible crotch.

(338) Q. I notice on the figures the use of arrows. I refer first to the girdle portion of the garment on the left-hand side, which is Figure 1. What is the significance of those arrowed indications which point north-south, east-west, for example? A. I am sorry, Mr. Taylor, there is no girdle. Both of them are panty girdles.

Q. The title of the patent is girdle, isn't it? A. Well, a generic term, but we have been referring to girdles as

body encircling-

Mr. White: Column 1, line 61 says, "Figure 1 is a view showing a panty girdle."

The Court: Mr. White, I really don't think we have to have the interruptions.

Q. What is the significance of the arrowed north-south, east-west? A. Two-way stretch.

Q. Two-way stretch they call it? A. That is right.

Q. And the panel has an arrow pointing up and down which indicates a one-way stretch? A. The front panel that is independent.

The Court: Could you go back to Exhibit 11 for just a moment?

(339) Was that a detachable crotchpiece?

The Witness: Are you asking me, your Honor?

The Court: Yes.

The Witness: Yes, it was.

The Court: Anything else on Exhibit 12, Mr. Taylor?

Mr. Taylor: No, your Honor.

The Court: Let us have a short recess.

(Recess taken.)

The Court: Do you, Mr. Taylor, have anything forthwith Mrs. Erteszek?

Mr. Taylor: Just give me a moment, Judge. (Pause.)

By Mr. Taylor:

Q. Mrs. Erteszek, in considering the subject of your patent 3,142,300, Plaintiff's Exhibit 3, would it be correct to say that the improvement which you ascribe to the construction of the garment in Plaintiff's Exhibit 3 as compared to that of Plaintiff's Exhibit 1, the 301 patent, consisted of adding an extra piece of crotch on the inner panel which attached to the existing crotch and changing the stretch of the front panel to a full up and down panel? A. Well, Mr. Taylor, this is a simplification. This would be the way a child would describe a picture. There was more to it than the "will meet," because the garment had to be (340) redesigned somewhat to the point that the stress would work against one another.

Q. In the deposition which you gave on July 23, 1968, you were asked the following question at page 32 commencing on line 15.

mencing on line 15:

"Q. You stated in one of your answers just given that you improved the garment, Plaintiff's Exhibit 3," which is now, of course, Plaintiff's Exhibit 16.

"Will you describe what that improvement consisted of? A. The improvement consisted of adding an extra piece of crotch on the inner panel which attached to the existing crotch and changing the stretch of the front panel to a full up and down panel."

Do you recall that testimony? A. Yes, I do; and that is exactly correct, except where the garment number one, the first garment, Plaintiff's Exhibit 16—

Q. Plaintiff's Exhibit 16. I just want to identify its number here. A. No. I meant the other one.

Q. This is Plaintiff's Exhibit 15, is that correct? A. 15, that is correct.

This one has a completely different cut, your (341) Honor, on the underneath part. It goes around in a form of a girdle of a skirt girdle.

In order to achieve the pull that I wanted, I had to redesign the front panel somewhat to the point that rather than going up, I had to bring it down in the front in order to accommodate the inside crotch.

Q. Why isn't your testimony completely satisfactory in describing the improvement—

The Court: Mr. Taylor, I can get the fact of what she said and whether there is any variation. I don't think we have to have any argument about it.

Anything else?

Mr. Taylor: I don't think so.

The Court: All right. Mr. White will examine Mrs. Erteszek after lunch.

Are there any witnesses after that?

Mr. Taylor: I have none.

The Court: You will rest after Mrs. Erteszek's testimony?

Mr. Taylor: That is right.

The Court: Did you say you had one more patent you wanted to put in?

Mr. Taylor: Yes. We have stipulated that so that that will not necessitate Mr. Lands taking the stand again. (342) Mr. White has agreed.

The Court: All right.

Mr. White: Why don't we mark it and get it in before we go to lunch. It will just take a second.

Mr. Taylor: I offer in evidence a copy of U.S. Patent No. 2,431,571, to Lehr Foreman's brief as Plaintiff's Exhibit 39.

Mr. White: No objection.

(Plaintiff's Exhibit No. 39 was received in evidence.)

Mr. Taylor: And I offer in evidence a garment made by Vanity Fair in accordance with the—

The Court: Let us finish with the Lehr patent. What

is the number on that?

Mr. Taylor: Plaintiff's Exhibit 39.
The Court: What is the next exhibit?

Mr. Taylor: And I want to offer in evidence a garment made in accordance with the disclosure of the Lehr patent, Plaintiff's Exhibit 39, as Plaintiff's Exhibit 40.

Your Honor said that I might explain the purpose of

this garment and I will now demonstrate that.

Your Honor will recall the explanation given by Mr. Lands of the wrap-around and the idea of a deeper confirmation. You will observe that when this garment is assembled (343) as you find it in the figures of the Lehr patent, Plaintiff's Exhibit 39, that it overlays—

The Court: I can see that pretty much from Figure

10 in Exhibit 39. Is that right?

Mr. Taylor: That is right.

The Court: All right.

Mr. Taylor: The panel comes up and fastens at the waist and you have the panty girdle with a panel.

The Court: Figure 1 and Figure 3, right?

Mr. Taylor: Really, Figure 10 is a better figure to look at as to how it appears when it is assembled.

Mr. White: There is just one thing I should comment on this exhibit and perhaps it shouldn't go in for this reason.

I am sure it was never the contemplation, was it, Mr. Taylor of the patentee or the description to make it out of that particular kind of material?

Mr. Taylor: Well, they make it out of an appropriate material and this was merely—

The Court: With that condition, that will be received.

(Plaintiff's Exhibit 40 was received in evidence.)

The Court: Let us recess until two o'clock.

Mr. White: We are calling on the phone to have (344) the text of that letter read to us and we will bring it in and read it aloud and get the date, but we don't somehow seem to have a copy of that letter.

The Court: Do you have any other witnesses besides Mrs. Erteszek?

Mr. White: The sales manager, who is going to tell about the damage matter.

The Court: I think we can finish this afternoon.

Mr. White: I hope so, your Honor.

(Luncheon recess taken.)

(345) Afternoon Session

(2:10 p.m.)

Mr. Taylor: If your Honor please, we have just one open item and I suggest that perhaps it might be preferable to handle it, because the deposition of Florence Reardon of November 9, 1968 is in evidence as Plaintiff's Exhibit 37, and your Honor will recall that Mr. White read certain portions and then you said to me that I should read whatever I should prefer—

The Court: I would appreciate that.

Mr. Taylor: It is before you anyhow. The transcript original is before you anyhow as Plaintiff's Exhibit 37,

so I don't see any point in taking the time in reading portions of it.

The Court: That's right, and it is a short deposition. I would like to have it now, though, if I could. I will certainly read the deposition. There is no problem.

Mr. White?

Mr. White: Does the plaintiff rest?

Mr. Taylor: It does.

Mr. White: First, your Honor, as Defendant's Exhibit D I offer a handwritten copy in my handwriting of (346) the text of a letter from Mr. Erteszek, president of the defendant, to Mr. Charles Burg, president of the plaintiff, September 1, 1967.

Mr. Taylor: I don't see the point of going into the infringement warning, unless there is some question which we do not raise that there has been a warning infringement letter. But why we have to get into this which may entail—I have already told Mr. White that I claim the privilege on my reply and opinion to Mr. Eaton and his letter to me, so I don't see what purpose is served, because it is amply clear and there certainly is no denial—

The Court: Following up the discussion in the robing room I asked for this as a matter of interest. I don't know whether it should be admitted or not. I haven't read it. I read certain other letters.

Would you object to me reading this?

Mr. Taylor: I have no objection to that, but I don't think we ought to mark it in evidence.

Mr. White: I think it is relevant as to the origin of this controversy.

Mr. Taylor: I don't think there is any question but that the Olga Company will admit there is a controversy. There has been no challenge to my original (347) complaint for declaratory judgment and the pretrial order specifically referred to the fact that there was an adversary relationship or judicial controversy.

The Court: You are stating, Mr. White, that this is a transcript of the letter which the Olga Company wrote at the time it claimed the infringement?

Mr. White: That is correct, and it shows that they sought promptly to assert the ownership of the patent, but in a very gentlemanly way, if I do say so.

The Court: You object to receiving it in evidence?

Mr. Taylor: I do, because you see the pretrial order refers to the letter and sets up the controversy, and that is all this Court is interested in.

In order words, is there a justiciable controversy, and the pretrial order says there was and there has been no objection to my complaint for declaratory judgment.

Mr. White: I can tell you the legal relevancy of this document.

What this document shows is that in response to this letter, Exhibit D for identification, the plaintiff made no attempt to give any response to it other than the unforewarned initiation of a lawsuit, and I think that it (348) goes to the equities of the case and the good faith or lack thereof of the plaintiff in the manner in which it has dealt with the defendant in this whole matter. I offer it for that purpose.

Mr. Taylor: I don't think this lawsuit has anything to do with taste.

The Court: I don't want to take a lot of time on a ruling. I will reserve judgment on the letter. Let us go ahead with the further testimony.

Mr. White: As the second matter I call upon counsel to produce the letter from the plaintiff to himself in August, 1966, which has already been read both by me and by the Court.

Mr. Taylor: I claim a privilege on that, as I made clear to your Honor, and I want to have the Court informed as well as Mr. White but I don't think it belongs in evidence, and certainly there has been no waiver on my part or on

behalf of Vanity Fair of the privilege that exists between counsel and client with respect to an opinion.

Mr. White: I think it is the most cogent evidence and direct evidence that we could possibly have. It is a contemporaneous expression of opinion by an officer of the plaintiff as to the novelty and commercial (349) desirability and/or originality of the garment here in issue and there has definitely been a waiver of any privilege on it and I request that it be produced and put in evidence.

If it was inadvertent for me to have been given it here in court today, it was not inadvertent that counsel quoted from his opinion in his memorandum on the issue of infringement submitted in evidence and one cannot quote a part of a transaction and preserve the privilege as to the remainder of it.

The Court: What was the quotation?

Mr. Taylor: The quotation was the last two paragraphs and I will read them to you, if your Honor please.

Mr. White: Just a minute, Mr. Taylor. We are trying to hurry things along.

Look on page 2 of the memorandum, please, your Honor. It is described on the preceding page.

Mr. Taylor: It merely states the conclusion, if your Honor please.

The Court: Mr. White, I am reluctant to make a break in the privilege here.

Mr. White: That is very prejudicial.

May I just quote the statements of facts?

(350) The Court: Let me just think out loud for a minute.

I hadn't had a chance to read the memorandum before we had our conference in the robing room before lunch, and at that time, as you know, in connection with talking about a possible settlement, why, Mr. Taylor showed me the letter requesting advice and then his letter of advice. I think

Colloquy.

that was done under circumstances where the privilege was retained and not waived.

As far as this paragraph, the quotation in Mr. Taylor's memorandum of two paragraphs from his opinion letter, it certainly is a waiver on those two paragraphs. But the thing you want in evidence is the letter from the officer. I don't think a quotation from the opinion letter really waives the privilege as to the letter from the officer.

The letter from the officer was a request for advice and I wouldn't think that the waiver would extend that far.

That would be my view.

Mr. White: I would like to state a brief chronology.

When presented with the memorandum at the beginning of today's session by Mr. Taylor I immediately, of course, read the two paragraphs on page 2 of that (351) memorandum. I did what any workmanlike lawyer would have done were he me, I went right over to Mr. Taylor and I said, "I need now to see your entire opinion and the letter requesting it," because in my opinion, your Honor, that most certainly does constitute a waiver.

Mr. Taylor, with no mention of privilege of any kind said, "Here it is."

I read it and I never was told that he claimed privilege until just now before the beginning—

The Court: What did he give you to read? Both letters? Mr. White: Both letters and the whole document, and I read it.

The Court: I think that is-

Mr. Taylor: What I said, "I am not producing it, but I will let you read it, Mr. White," and I don't think you have to go into all the details of the retaining of the privilege in order to permit counsel, who has made a request that he wants to see this as a part of a situation, and so I gave it to him and I said, "Sure, you can read it," but I did not offer it and when he suggested that it be offered in evidence I said no.

Colloquy.

The Court: I am afraid you have waived the privilege. (352) I would have said as to what happened in the robing room I was going to bend over backwards. If it just be shown to me for purposes of settlement discussions I would protect you on that, but I think if you gave it to the opposing counsel I don't see how you could claim privilege any longer.

Mr. Taylor: I didn't give it to him. I said, "If you want to read it here it is."

The Court: That is making it available. I think we are taking a lot of time. What he wants to show is an admission by the officer, and I think you have waived that.

Mr. White: I offer the August 19, 1966 letter from F. Eaton—

The Court: I will compel the production and receive it in evidence.

Mr. White: If the Court would like a further opportunity to consider, of course—

The Court: I am not going to repeat myself. Where the document was produced in this courtroom to opposing counsel, that is a waiver of the privilege, so the privilege is out. I think the document should be produced and received as admissions.

Mr. White: I offer in evidence as Defendant's (353) Exhibit E a letter from Mr. Eaton to Mr. Taylor dated August 19, 1966.

Mr. Taylor: I don't suppose there is any use in my prolonging this argument, but I don't see how, when I said, "I will let you see it but I won't produce it"—why I haven't expressly retained the privilege which would be apparent, I think, to almost any lawyer.

The Court: I am not going to make a point out of the form of words.

This is a kind of awkward thing. Mr. Taylor, I suppose, if he had said, "Lwill give it to you with the understanding

Colloquy.

that the privilege is not waived and you can use it for a limited purpose," can make that kind of a reservation.

Mr. White: If I accepted it on those terms, yes.

Mr. Taylor: Then you wouldn't have seen the letter.

Mr. White: Then I would have most strenuously urged waiver under the doctrine I alluded to, one cannot withdraw a veil over a part of a transaction and keep it cloaking the remainder.

The Court: Exactly what did you say to him, Mr. Taylor?

(354) Mr. Taylor: I said to him, "Yes, you can look at it, but I won't produce it."

I didn't want to get into any technical discussions with Mr. White because I think we ought to be, at least the Court and the counsel, familiar with almost any circumstance, and I don't see any reason why, if I am courteous enough to phrase it without all of the legal prescriptions, that that should change the circumstances of my handing it to Mr. White.

Mr. White: May I say that I will stand entirely, your Honor, in view of Mr. Taylor's statement to me just now—I will stand 100 per cent on the doctrine of partial waiver.

The Court: I don't know what the law is on that. I think that is helpful.

Let me just reserve ruling on that.

Mr. White: Since the Court has read it-

The Court: Mr. Taylor, the offer of these documents into evidence is made by Mr. White solely on the ground and on the contention that by quoting the two paragraphs in the memorandum you made a waiver of privilege as to both letters.

I will have to consider that and I will reserve decision on that.

(355) Thank you very much.

Mr. White: The next item that I wish to address myself to, if your Honor please, is that of the second of the two legal questions before the Court, namely, that of infringement.

I understand from reading Mr. Taylor's memorandum that I have just referred to, as I have understood throughout, that Mr. Taylor does not contend that his client's garment, which is in evidence here as Exhibit 23, does not fall under the umbrella of the patent claims in suit if, contrary to his contention, those claims should be sustained as valid. It is in that sense that I would like to call upon him now, in the interests of short-cutting things, to concede that in that eventuality, unlikely though it may seem to him, he will not defend the case on the basis that the garment does not actually infringe those claims.

If he will make that concession, then we can proceed.

Mr. Taylor: I will not make that concession because of the positions that I have taken in my brief from the very beginning of this case and in clear discussion with Mr. White, as indicated, an invalid patent may not be infringed, and that's that, and I have cited all the (356) cases that I think there are in support of that position.

The Court: I don't think there is any use in discussing it further. Mr. Taylor won't make the concession. I think

he pretty clearly announced that Tuesday night.

Mr. White: I call Mrs. Erteszek as defendant's witness.

Olga Erteszek, called as a witness by defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. White:

Q. Mrs. Erteszek, you have already explained who you are.

For how many years have you been designing foundation garments. A. Upwards of 30 years.

Q. And have you been designing girdles, panty-girdles and briefs during that period of time? A. Yes, I have.

The Court: You have been in the foundation designing field for about 30 years, right?

The Witness: That is correct.

The Court: That has included girdles-

(357) The Witness: Pantygirdles and briefs; foundations.

Q. Mrs. Erteszek, could you describe for the Court the various types of pantybriefs—let me amend that question to elasticized pantybriefs that were in commercial existence prior to the time that you got the first idea leading to the invention of the patents which are here in suit? A. As far as I was aware of what was existing on the market, it was just a plain elasticised garment, which was known as brief.

A brief was a brief was a brief. There was no deviation from it. It was a small pantygirdle, legless, with a crotch going through it doing near nothing.

The Court: Do you have a picture?
The Witness: Of this there is no—

Mr. White: We have, your Honor, in the case of the Jantzen Exhibit 18, no picture. There may be some in the catalogs, yes.

That is Exhibits C and D.

The Court: Do you have an actual garment? Mr. White: Yes, we have an actual garment.

By Mr. White:

Q. I show you Plaintiff's Exhibit 18, Mrs. (358) Erteszek, and ask you if that exemplifies what you have just

described? A. Yes, more or less it does. Different form of elastic, different shape perhaps in the leg or over here, but basically that was the type of the garment that was on the market.

Mr. White: May I see Exhibit 25, please?

Q. Mrs. Erteszek, I show you plaintiff's Exhibit 25 and ask you if that also exemplifies the kind of garment which you just described? A. Very much so. It is very similar in design and, I would say, function to a lesser or greater degree, depending on the strength of the elastic. But this is the material; the function is the same.

The Court: The Jantzen garment, maybe the chronology is already in evidence, but how long does that date back?

Q. Not this particular one, but how long were such garments being sold? A. I don't know. Certainly before my time.

The Court: Back before your designing days? The Witness: Before I started designing.

Q. In the 1940s? A. I would say so.

(359) The Court: So at least 30 years, right? The Witness: That's correct. Now, that is as near to my recollection as I can give.

The Court: Exhibit 25 is a Vanity Fair garment, right, Mr. White?

Mr. White: Yes, your Honor.

The Court: This is a Vanity Fair garment?

Mr. White: Yes, it is, your Honor. It is Model 31-1.

Wasn't that number changed later to something else? It was changed to 40-1 as well.

The Court: Do we have a dating on this? How long does this go back?

Mr. Shannon: I believe Mr. Lands testified that it was from 1961 to 1969.

Mr. White: Yes. I say it was among the initial family of garments produced by Vanity Fair when they first got into the foundation business, as Mr. Lands testified had occurred when he first went to work for them.

Mr. Taylor: In any event, it was much prior-

Mr. White: 1961.

Mr. Shannon: Through 1969.

The Court: From when?

(360) Mr. Taylor: From 1961 to 1969.

The Court: I guess that is in the record, but it just gets me back in context.

By Mr. White:

Q. Mrs. Erteszek, Exhibit 25, as we have just heard, is a Vanity Fair brief, but does this Exhibit 25 exemplify garments manufactured by other firms prior to 1960? A. Yes. It is very much a run-of-the-mill sort of a brief that was known under the general category of briefs, elasticized briefs.

Q. Were there in existence prior to 1962, in a commercial sense, let us say, briefs which would be similar to Exhibits 18 and 25, but which had some form of panel overlay in the stomach portion? A. That was 1961.

Q. Yes, from their back. A. I myself had a brief which had an inserted satin elastic front which was pulling up and down as against the body pulling around. Now, I had no patent on it. It was just my interpretation and my attempt

toward a stomach control, a greater one than was offered in those garments that we see here.

The Court: Let me see if I understand.

Your company had on the market the garment (361) you have just described and that was a brief like the ones we have just talked about with a satin panel over the stomach, is that right?

The Witness: As an integral part of the garment. The Court: Was it an overlaid panel or was it—The Witness: As far as I remember, it was inlaid. The Court: Go ahead, Mr. White.

The Witness: That was, if I may explain it—that was purely done on the strength of the different

pulls so that--

The Court: The panel would stretch which way? The Witness: The panel would stretch vertically.

By Mr. White:

Q. Up and down, we will say? A. Up and down, yes.

Q. Was this inlaid panel that you have just described sewed to the remainder of the garment through its entire perimeter? A. Yes, it was.

Q. How long had that panty been on the market at (362) the time that you first got the idea of designing the garment which is the subject of this lawsuit? A. Would you repeat it, please. I don't believe that I fully understand.

Q. Maybe I am trying to go too quickly.

Mrs. Erteszek, can you now tell us when it was that you got the idea for the brief which you later applied for a patent on which is here in this case?

Mr. Taylor: Which one?

Mr. White: It would be the first one, the 301 patent.

Just for orientation, that was applied for on November 20, 1962.

- Q. Can you tell us when it was that you first got this idea? A. I couldn't tell you an exact date on it, Mr. White. However, I know where the idea came from. It was the idea after having explored, found out that the existing garments were binding in the leg and, to top it off, they didn't offer any stomach control, which, in my opinion, is one of the primary importance in the girdle industry, the purpose of control of the stomach.
- Q. Would you say that the lack of stomach control and the leg binding problem existed in the Olga garment (363) that had the panel inlay that you just described? A. I was hoping that it was lessened somewhat because of the different stresses of the up-and-down stretch which carried through the crotch and therefore eased up the circular stretch which a garment like this—

Q. Pointing to Exhibit 18. A. -offers.

The Court: I don't think I am clear about the answer.

You are talking about the garment with the inlaid panel?

The Witness: Yes, your Honor.

The Court: And you are talking about what you hoped that would do?

The Witness: That's correct.
The Court: Explain that again.

The Witness: The inlaid panel carried through the crotch, therefore easing the continuous round stretch about the wide part of the thigh or the crotch.

The Court: You mean the panel went down into the crotch?

The Witness: Yes. The panel continued through the crotch.

Q. Give us some idea of the width of that panel, (364) will you, Mrs. Erteszek? A. Well, it would be about—I really don't remember exactly what it looked like.

As far as I remember, it was narrower at the waistline, it widened around the tip of the stomach, scooping down toward the crotch and continuing through the crotch.

The Court: It is important that I understand this.

I don't understand still and if you can explain it just once more to me what you hoped that the inlaid panel would do on that garment.

Mr. White: Meaning Exhibit 18?

The Court: On the inlaid panel garment. Tell me that again.

The Witness: If I may perhaps digress a minute in order to explain.

The Court: All right.

The Witness: Whenever you combine different stretches, one pulling one way and the other one pulling another, you alleviate one from another. In other words, you distribute the stretch rather than taking like a rubberband around the circumference of the body.

I am sorry. I am having a hard time.

The Court: What were you trying to relieve (365) or alleviate on this inlaid panel garment? The Witness: The pressure on the crotch.

By Mr. White:

Q. Because that was a problem, was it? A. Because this was the main problem with the existing briefs.

The Court: The main problem with the existing briefs, you say. Let me get that.

Q. And by that you mean the briefs like Exhibits 18 and 25, Mrs. Erteszek? A. That's right. That's right.

Q. Was the pressure on the crotch?

The Court: Was the pressure on the crotch? The Witness: On the inside of the leg, on the crotch, yes.

Q. At any time, Mrs. Erteszek, you feel it will aid your testimony, you are perfectly at liberty to ask the model to put on any garment.

The Court: I think I can get this.

In other words, since garments like 18 and 25 were made of this power net material?

The Witness: Not originally. Power net came later. This was one of the very earliest.

The Court: In other words, sometimes there (366) would be a problem of pressure on the crotch, right?

The Witness: In most of the cases there was, yes.

The Court: You came along with your inlaid panel garment, and how did you hope to solve that or help that.

The Witness: If your Honor will follow me, this particular garment has a stretch going this way, but it is absolutely rigid going down. Therefore, there is no give which allows a continuous softer feel to the body. It just stops at a certain point and digs in, simply digs into the body.

The Court: There was no vertical stretch?

The Witness: No vertical stretch.

The Court: Then was there a stretch in the crotch piece here?

The Witness: Yes. The crotch was part of the vertical stretch.

The Court: Now we come to the part with the inlaid panel. You have in the inlaid garment a panel which stretched vertically, right?

The Witness: That's correct.

The Court: That would ease up on the crotch because there would be a lot more stretch in the front (367) of the garment?

The Witness: Could we show it on the model? The Court: I think I can get this point.

The Witness: In other words, as the woman sat down, the garment had to pull down because there was no counteraction to it.

The Court: But in your inlaid garment— The Witness: There was that action built in.

The Court: All right, I have that.

By Mr. White:

Q. Just on that score, Mrs. Erteszek, the garment which you just described, how did it compare with Exhibit 26, which is a Vanity Fair brief with a vertically stretching panel? Pretty much the same or what? A. Similarly, though my panel, being satin elastic, had what we call a lazily way of stretching, therefore it didn't afford the kickback which we call—the kickback is the ready retrieve to the original form and therefore in many cases hurting. The soft, easy up-and-down stretch afforded this part being very easy on the body as well.

The Court: You are saying your inlaid garment had the soft stretch?

(368) The Witness: Right. It had a satin elastic. The Court: How do you compare it with Exhibit 26? Is this not a soft stretch?

The Witness: This is the same stretch as the one that goes across, the idea being the same, but—

By Mr. White:

Q. Wait a minute. The fabric is going in different directions, but you are saying it is the same strength of stretch? A. Yes.

The Court: You said in your garment with the inlaid panel there was a soft stretch?

The Witness: That's correct.

The Court: And you contrasted it with a stretch that hao 'he kick, right?

The Witness: The kickback, yes.

The Court: Tell me as to this garment you have in your hand, which is Exhibit 26, is that a kick stretch or a soft stretch?

The Witness: This is a kickback.

The Court: A kick stretch?

The Witness: Yes.

The Court: That is the Model 40-6, right?

(369) Mr. White: Yes, your Honor.

The Witness: In fact, this is a superimposed panel which means that it has an even stronger kickback because it is double.

Q. Mrs. Erteszek, what is the effect on control of shifting to the soft stretch inset? A. Now, the control is in the vertical—in the horizontal. Forgive me. Forgive me, I don't know my horizontal from the vertical.

The stretch or the control is strictly in the horizontal because—

Q. With the soft stretch? A. With the soft stretch because the particular garment that I am talking about had

only a one-way stretch. The soft stretch was running vertically and horizontally—

The Court: I understand.

A. —was rigified.

Q. What I am trying to ask you, Mrs. Erteszek, I take it that the satin inset that you have described, the purpose of it was to relieve the leg pressure or the discomfiture of the legs. A. That is correct.

Q. What, if anything, did it do to help flatten the tummy? (370) A. It was a step forward. It wasn't the final solution, let's put it this way.

The Court: In what way was it a step forward as far as flattening?

The Witness: That instead of stretching this way, this part in the front was rigid. In other words, it stretched the rest of the garment, leaving the front rigid.

Q. So it was, in effect, acting like a rigid panel, as far as the tummy was concerned? A. That's correct.

Q. A rigid panel sewed all around?

Did the fact that it was stretching up and down to relieve the leg pinching help the tummy flattening? A. Yes, it did. It did help.

- Q. By the way, was the brief with the satin inset that you have described sold by the Olga Company? A. Yes, it was.
- Q. Over what time span, as near as you can tell? A. That would be, again, a guesstimate on my part, because I was, as I mentioned before, always in the design and never had much to do with the sales end of it, but I knew that it was successful for a goodly amount of time for two reasons.

(371) First of all, that it was one of the first if not the first, of this kind, and, secondly, there were no two-way stretch fabrics available at that time. That was from the Korean War, right after the Second World War, where fabrics were not—there wasn't much choice in fabrics so you had to do with by engineering rather.

Q. Mrs. Erteszek, have you described now the situation as it existed in regard to the manufacture of pantybriefs at the time that you got the idea for the garment which is

here involved? A. That's right.

The Court: Excuse me for interrupting you, but it

would help me to know that I am oriented.

I will ask you and Mr. Taylor, at the time you are talking about, which is, let us say, 1962 or before, when the 301 garment was being developed, do I understand there was the concept of the brief which had been developed and we have Exhibit 18, we have Exhibit 25, right?

Mr. White: Yes, your Honor.

The Court: Then we have Mrs. Eretszek's description of the inlaid panel brief?

Mr. White: Yes.

The Court: Do we have no brief at that (372) time with an overlaid panel?

Mr. White: That is a good question, your Honor.

By Mr. White:

Q. Mrs. Erteszek, do you recall ever having been aware of any brief on the market, any brief, again, before you got the idea for the one here involved, in which there was a panel of two thicknesses similar to Exhibit 26 instead of an inset panel? A. I understand. I have to answer it somewhat differently.

When I began designing garments-

Q. Away, way back 30 years ago. A. Way back, way back.

Mr. Taylor: If the Court please, I think that we can have a year mentioned here or an approximate date, because this type of description really is not of any significance unless we know what the time element is.

The Court: I think we have to do the best we can.

Mr. Taylor: All right.

The Court: What we are trying to do is to get the scene as of the time that she started to develop (373) the 301 garment. The question is whether at that time or before that there was any overlaid panel brief. I think she is doing the best she can.

Mr. White: She is starting in her answer by pref-

acing it to say she is going away back.

The Court: Let us go ahead. Read the answer before the interruption.

(Record read.)

By Mr. White:

Q. Will you continue. A. I was little aware of what

was going on in the market. That was twofold.

I had my very own idea of the needs of the woman and I never wanted to in any way resemble in my design anything that was existing on the market. Therefore, I even resented my husband asking me to go to the stores and see what other people are doing. I never have done that.

Q. All right, Mrs. Erteszek, but the question is, do you know—you can't, of course, tell us anything you don't know, but do you know whether or not, at the time that we are speaking of, there had been on the market a brief with

an overlaid stomach panel? A. I understand the question, Mr. White.

(374) I cannot recollect that.

Q. What were the drawbacks in these briefs that had previously existed that caused you to put your mind to making a better one? A. Well, aside from the thing which I have mentioned before, that they were uncomfortable and people really couldn't wear them for a certain amount of time, I felt the need of a short or brief garment for sport use or any other leisure type of use that still would perform a function. I was always for giving something to the public, not trying to sell something for nothing.

Q. What do you mean, which had a better function? You will have to explain that. A. In other words, in the corset industry the main function that we are always trying or striving toward is to flatten or control the stomach. Any other part of the anatomy has been exploited and explored in different ways, in different fashions. There was never a time in history where stomach was fashionable

The Court: Mr. White's question about the drawbacks in the existing briefs, were there any drawbacks in your inlaid panel brief or any things you were trying to improve or bring out different features or however you want to say it?

(375) The Witness: Yes. I felt that it didn't

sufficiently do the job that I set up to do.

In other words, it did not fully control the stomach and the leg could have been more comfortable.

Q. This inset panel brief, was that the only brief that your company was selling at that time? A. As far as I remember.

Mr. Taylor: At what time, Mr. White?

Mr. White: We are talking now about-

Q. How long before you signed this patent application in November of 1962 did you begin working on this project? A. Oh, I imagine six months or so.

Q. So we are talking roughly about the middle of the year 1962, give or take? A. Give and take, because I

really cannot pinpoint it.

Q. At that time, in the middle of 1962, were your competitors selling any brief that you considered to be similar

to your own? A. Not that I was aware of.

Q. Was your brief more or less accepted by the trade than those of your competitors at that time? A. My brief was an instant success. I have upwards (376) of 30 inventions, and this was one of the several which I was particularly proud of because it seems to have answered the desires and the requests of the buyers and those of the salesmen from the field.

The Court: You are talking about the inlaid panel brief now?

The Witness: No. I am talking about the 301. I am sorry. Is that—

Q. I will have to be very careful, think. I have to be more careful, Mrs. Erteszek. A. I misunderstood, then.

- Q. I am still talking about the one that you described which had the satin insert, the earlier one. A. That's right.
- Q. What I am really asking you is, was that more or less successful than competitive briefs at that time? A. That was very successful, except that times were such that it was very easy to sell things.
- Q. What caused you to be conscious of a need to make a different garment in the brief line? A. Well, I myself have always been my own guinea pig, and I was wearing

it, I was testing it out, and I have always followed very closely the outer fashions and, well, (377) call it intuition,

call it an answer to an unspoken need.

Q. But specifically in what respects were you looking for improvement? Say them again, would you, please? A. Yes. I wanted to relieve fully the pressure on the inside of the leg part, which is referred to as crotch, and a special stomach control. That, as far as I knew at that time, was nonexisting, a brief which would offer a special stomach control so it could be worn really under an outer garment and really show the improvement of the figure.

Q. What do you mean by a special stomach control? A. Special meaning working especially well, achieving the

purpose.

The Court: In other words, your inlaid panel brief gave some stomach control?

The Witness: That's correct.

The Court: But obviously it won't give as much as a regular girdle, right?

The Witness: That's correct.

The Court: You were trying to get something closer to a regular girdle, right?

The Witness: That's right.

The Court: Let me ask you, if I could, again (378) just trying to set the state for the new development, what about this Gossard pantygirdle; was that on the market in the early 1960s when you were developing 301?

I show you this picture in Exhibit 13.

The Witness: I really don't know when it went on the market. As I mentioned before, I was not scouting the market purposefully.

The Court: Do you have a memory of the Gossard

garment?

The Witness: Yes, indeed.

The Court: Was this something that you would consider to be a brief?

The Witness: That was a brief, yes.

The Court: And was it sort of like your inlaid panel brief?

The Witness: Not exactly.

Mr. White: Excuse me. Let me interject.

I was about to hand the witness Exhibit 20, which has been identified in this trial as a Gossard garment of recent vintage, and I am only suggesting that the witness exercise some caution in not leaping to the conclusion that it is exactly like the one in the earlier days.

The Court: That is fair enough.

(379) Q. In what respect was your panel different from the one on Exhibit 20? A. Is that all right?

The Court: The inlaid panel garment that you put out.

The Witness: The inlaid paneled garment started—though it was a different shape, somewhat similarly to this, but it went into a crotch. It became a crotch at the same time. In other words, there was no foreign fabric in through the leg part.

Q. By the way, pull on the inset panel and just tell us if the fabric behaves like what you use in your panty. Just pull on it. A. It was similar, although in those days we didn't have Lycra so we used rubber, which was heavier and somewhat more cumbersome, less comfortable.

The Court: Did your inlaid paneled garment,—do you remember it was competitive with this Gossard garment? Do you have any memory of that? The Witness: As far as I remember, the Gossard garment was not in existence at that time.

Q. Can you tell us about when this brief of yours was on the market? A. That was, I would say, the early '50s.

(380) The reason why I remember that specifically is that the Korean War was on and we had troubles with getting enough workers, so we branched out to Santa Paula and I was the one who undertook the full responsibility. This was the garment which the whole factory in Santa Paula is operating.

The Court: Where is Santa Paula?

The Witness: It is toward Ventura North.

The Court: The Korean War ended around 1952, 1953, I guess, after Eisenhower came in, so you are talking about the very early '50s and late '40s?

The Witness: That's right.

The Court: And the Gossard patent is dated 1955 and we have a Gossard advertisement of 1954.

Mr. White: Surely the patent would have been filed within a year of the first sale, your Honor, because of the rule that says that you forfeit the patent if you don't file it within a year.

The Court: Just think back. I think you indicated earlier that you thought at the time you put out your inlaid paneled garment the Gossard garment had not yet come out, is that right?

The Witness: It certainly was not in my range of vision, so to speak. I was completely unaware of (381) that.

- Q. When did you stop making that garment? A. That would be very hard for me to answer, Mr. White.
- Q. Before you put 446 on the market? A. Oh, yes, indeed, before.
 - Q. Long before that? A. Not too, I believe.

The Court: Not too long.

- Q. If you don't remember, rather than get— A. I really do not remember.
- Q. At the time you began working on the design of the 446 garment, which is the 300 patent, you had for years not been making that garment with the satin insert? A. As far as I remember, that's true.
- Q. Were you making any brief at that time and selling it? A. I don't remember that. I rather have my doubts about it.
- Q. So it would not be accurate, I take it, for us to assume that your 446 garments represents in a direct sense an attempt to improve on the brief with the satin insert? A. That's true. One has nothing to do with the (382) other.
- Q. What did you consider to be the best panty-brief on the market at the time you began to design the 446 garment in 1962? A. I must repeat myself, Mr. White, that I was not aware of what was going on on the market. From the reception and comments of both our sales force and the buyers I assumed that mine was the best one on the market.
- Q. Just before that you don't have any recollection of having had any opinion about the best one, I take it? A. That's correct.
- Q. Shall we at this point perhaps model one of the 446 garments? A. Fine.

Mr. White: May I have Exhibit 15, please. That is the first version.

Q. Would you please show how it is that the two features of leg comfort and stomach control were achieved by Exhibit 15.

The Court: Would it be realistic—you do it any way you want, but could we just take it step by step

as to how the garment was originated, if she remembers it in that fashion?

(383) Mr. White: Yes.

- Q. Can you give us a story, Mrs. Erteszek, beginning with how you got this idea, what you did to carry it out? A. Yes.
- Q. That would be helpful. Please do. A. I wanted it to look in a way like a diaper, because I found this was the most comfortable way of encircling a leg of a baby without chafing it or hurting it, and at the same time, again, I'm always pounding on this one thing that I wanted to make sure that the stomach will be well controlled.
- Q. What about the need to have the garment legless? A. Well, that was a great need. Those things were coming from the market to me. Salesmen were writing to me: "It would be wonderful if we had a brief that would be comfortable in the leg that would do something for the stomach, but from what we hear, there is an impossibility to do such a thing."

In other words, what I wanted to say is that there had been attempts in that direction because the need was there, but there was not a solution heretofore.

> The Court: The best you can recall, just re-(384) call all the details you can what you did in the way of—I don't even know whether you drew or models or cut or thought or what have you about developing this garment, conferences with other people, I don't know what went on, but I would like to know.

> The Witness: I used to lock myself in my room away from my husband, as a matter of fact, because I did not want to clutter my mind with any outside interferences. An idea comes—

The Court: Was this a room at your office?

The Witness: At my office, yes.

The Court: How did the diaper idea come about?

Did you get models or pictures or analyses?

The Witness: Well, I am a mother of three daughters so I was fully familiar with the workings of it.

By Mr. White:

Q. Would you just go on, Mrs. Erteszek, and as best you can give us a running sort of description of the evolution of this garment. A. Yes.

Of course, this was the simplest way of doing it. At the same time that I tried to achieve a purposeful (385) garment. I also wanted to make it as simple for the production as possible.

That's how it evolved. It is very hard to say how—

Q. I can ask a few questions. I just thought of a few.

The Court: One more thing.

When the salesmen commented or you got comments from them to the effect that it seemed impossible to achieve the brief with the comfort in the stomach, why did they think it was impossible; do you have any idea?

The Witness: Because others have tried and they were unsuccessful about it. This seemed like a great challenge to me. That's why I set out to do it.

The Court: You are talking about things like 18 and 25 over there, right?

The Witness: Well, this one I was fully unaware of. I am talking about those two garments (indicating).

The Court: Go ahead, Mr. White.

By Mr. White:

Q. Mrs. Erteszek, did you yourself personally sew up the first garment of this new type of yours? A. I always sew my first samples. Yes, indeed (386) I did.

Q. Where? A. In my-at the factory in our sample

room.

Q. Is that first garment in existence at this time? A. I couldn't be sure.

Q. How did it compare with Exhibit 15 or differ?

Mr. Taylor: If the Court please, it has been stipulated and we have had the testimony that the garment which Mrs. Erteszek has before her is precisely in accord with Figs. 1, 2, 3 and 4 of the November, 1962 application and the patent 301.

The Court: That isn't the question. She is being asked when she first stitched up a model—if you did it the second, third and fourth time, what were those first models? Were the panels bigger, littler? What do you remember about those different trials that you made?

The Witness: I am pretty sure this—again, it's been quite a few years, but to my recollection it was very close to what I have in my hands.

Q. How many did you make up right off at the same time? A. That would be just guessing and I cannot say.

(387) Q. Did there come a time when you called a model and had her try it on? A. I tried it on myself.

Q. You tried the very first one on yourself? A. The very first one. Nobody could give me the feel, the reaction of a feel the way that I could have it myself.

The Court: Let us have a short recess. (Recess.)

By Mr. White:

Q. Mrs. Erteszek, when you tried this first handmade brief on did you wear it around a bit? A. Oh, yes.

Q. Were you satisfied with it? A. Now, which one are you—

Q. We are talking about the one you sewed on yourself and tried on. A. Are we talking about this one.

Q. The first one that you made.

Did it look like Exhibit 15? A. Similar to it. I couldn't vouch that it was identical.

Q. All I want to find out is whether you were satisfied with it when you tried it on. (388) A. I felt that I was on the road to achieving what I was after.

Q. Did you put on any other kinds of briefs to compare with it? A. I must have, because I was aware—now this is—

Q. You don't have any current recollection of it? A. I don't have any current recollection, but I knew what the other type felt like and the supposition would be I had one on before.

Q. Did you then make any new hand-made examples of your brief? A. Now you are referring to the hand-made as made by me?

Q. We want to go absolutely step by step through the day-to-day evolution of this garment and we are talking just now about the first one that you made, that I think you said you sewed by yourself. A. That's right.

Q. And you tried it on by yourself? A. I sewed it on the machine. In other words, it wasn't a hand-made garment.

Q. And you tried it on? (389) A. That's correct.

Q. Did you then make some changes in it? A. I cannot recollect how the steps went, but just from all my hence designs and previous to that, you don't build one in one day, so there were steps which needed improvement and I kept on that.

There are always six to ten samples before the one that says you come out.

- Q. To whom did you first actually show this new garment? A. My husband.
 - Q. Do you recall when and where? A. No, I don't.
- Q. Do you recall what he said when he saw it? A. That might sound conceited, but my husband isn't always my greatest admirer, so he was very pleased.
- Q. Do you recall what he said? He was pleased? A. He was.
- Q. Did you show it to any designers of yours? A. I had no designers at that time. I was the sole designer.

I might have had one or two samplemakers, but they were not designers per se.

- (390) Q. How did it come about that you observed the tendency of the skirt in Exhibit 15 to creep up while being worn? A. I must have worn it for a certain amount of time and given it the utmost test and then felt the stress on the lower part of the skirt.
- Q. It is your recollection, is it, that it was you yourself who observed this tendency? A. Yes.
- Q. And tell us how it came about that you solved that problem in the way that you did. A. Well, then very simply I came to the conclusion that there has to be some other force counteracting the one that pulls it up and I simply added to the existing one, I added another piece in the middle and connected it with the center of the outer crotch.
- Q. When you did that, why didn't it then become substantially the same as Exhibit 18, as far as your legs could tell? A. Because then the crotch became—there was no continuity to the—let me see.

I am having troubles explaining myself. I would much rather—if I had a pair of scissors I could much better explain.

(391) The Court: We have the final thing, haven't we, with the extra crotch piece?

Mr. White: Yes, your Honor. That is Exhibit 16.

Q. I show you Exhibit 16, Mrs. Erteszek. Does that illustrate the solution which you arrived at for the tendency of the skirt to creep up? A. Definitely.

The Court: Mr. White asked you this and this is something I have wondered about.

After you put the extra crotch piece on that encircles the leg with a continuous band, right?

The Witness: In a way, and I would like to explain why it was done that way.

The Court: All right. Let me just tell you my problem. It looks to me as if it encircles the leg with a continuous band just the way the Jantzen does.

Mr. White: Exhibit 18. The Court: Right.

After you put the extra crotch piece on so the legs are encircled, haven't you destroyed the advantage of having the diaper effect?

The Witness: Yes, but at this point I didn't (392) really care as much about the diaper as about the function which I was after.

The Court: Why isn't the garment now for all practical purposes just like the Jantzen garment as far as the legs? Each leg is circled with fabric.

By Mr. White:

Q. I think his Honor means why doesn't it hurt just as bad as the Jantzen one would hurt if you wear it? A.

There are several answers to it. No. 1, the piece, the inserted piece of tricot, which has a very lazy stretch, therefore it does not come back strongly, afterwards just to lay on the body without cutting into it, and by the same token—if I could impose on you to help me with this, to put your arms through there like this, through the circumference of the body.

You see, by the same token, when you pull this up, that relieves the inside of it. There is no action on the inside of this at all.

If I had attached it to this, like the normal garment, the one shown over there, there would be a continuous pull. But because this looseness of it starts from here—

The Court: It starts from where, at the bottom? (393) The Witness: It starts from where the seam is. The looseness starts there and on the body it stretches this way and it stretches the width from the front to the center of the crotch, and then back on its own. Then this elastic stretches firmer. This part remains merely close to the body.

The Court: I think I am beginning but not fully sure. I am not there.

I understand that the fabric on the inside crotch piece is tricot and that, as you say, has a lazy or easy stretch?

The Witness: Right.

The Court: The outer crotch piece and this outer panel is power net, right?

The Witness: Yes.

The Court: That has some stretch with some kick, right?

The Witness: That's correct.

The Court: But beyond that I think you are trying to tell me something that I really don't understand.

Mr. White: May I just suggest, your Honor, that it might be helpful to bear in mind that for every action there is an equal and opposite reaction, and if the (394) crotch is pulling down on the top, the top is pulling up on the croth.

The Court: I am sure that is true.

The Witness: We are trying to make your Honor an expert in the girdle business.

The Court: Let me ask here: the witness was trying to tell me something. You just keep on until I understand.

The Witness: The pull on this one goes from this point and then this point to that point, which is hardly encroaching on the part that would be painful to the leg, and by this it releases the inside.

The Court: That is what I don't understand. I don't understand that by pulling on the outer panel you release the inside. That is what you are trying to tell me.

The Witness: Yes, yes.

The Court: It seems to me what the body is going to do is, depending on the shape of the wearer and she pulls it and so forth, there is going to be a pull between the crotch and the waist.

The Witness: That's right.

The Court: Supposing she pulls it up at the waist. What that is going to do, it seems to me, is going (395) to tighten the whole thing up and down.

The Witness: Up and down. That's why we have the reaction going this way.

The Court: It is going to tighten the tricot crotch piece, isn't it?

The Witness: That has nothing to do with it, the tricot. The tricot has nothing to do with the up-and-down panel. The tricot is attached to the horizontal

part and the horizontal part is much easier than the vertical.

- Q. Mrs. Erteszek, will you look now just briefly at Exhibit 24. You understand what Exhibit 24 is? A. Yes.
 - Q. What is it? A. It is an attempt to copy our garment.
- Q. The point is the panel has been unstitched and is hanging loose, is that correct? A. Yes, yes, that's correct.
- Q. If the wearer puts Exhibit 24 on with just leaving the panel hanging loose as shown in the exhibit and then reaches down between her legs and pulls this up and holds it here—do you understand that? A. Yes.
- Q.—which is more comfortable, while it is hang- (396) ing loose or when she has it up here now and gripped it at the top? A. When she has it up and grips it on the top.
- Q. Why is that? A. Because there is a counteraction to this circular pull?
- Q. Is it because by pulling on it—I wish I were a female and had leotards on, your Honor—is it by pulling up on it you are relieving the pull of the crotch on that? A. That is exactly what—
- Q. Is it that you are transmitting force up to the waistline or up to the upper portion of the garment that relieves what would otherwise be gripping on the thigh. A. That is exactly what it is.

The Court: I think I do understand. Of course, this is the Vanity Fair garment, isn't it?

Mr. White: Yes.

The Court: I guess it is the same.

Mr. White: It is the same.

The Witness: Except for this extent.

The Court: When you are talking about the exhibit, refer to the exhibit.

Mr. White: Exhibit 24.

(397) The Court: What you are telling is by having these dual crotch pieces, if I pull the outside one, the arrangement of the seam, having the seam in the center of the bottom, means that I would be pulling up from the seam and it will cause a contraction—

Mr. White: A relief of pressure, shall I say?

The Court: In other words, it would cause a contraction, just like I am doing here?

The Witness: In that form, yes.

Mr. White: In an exaggerated form.

The Court: And loosening the intercrotch piece? The Witness: That is exactly what happens.

The Court: All right, that is helpful.

Does it depend on the dimensions? In other words, do you have a certain length to the outside piece and a certain length to the inside piece so that there is a certain looseness in the inside piece?

The Witness: Yes, yes.

The Court: If I measured from the bottom seam to the top of the outside panel, it wouldn't be exactly the measurement of the bottom seam along the inside, would it?

(398) The Witness: No, that's not necessarily so, your Honor.

The Court: It seems to me loose inside.

Mr. White: You have to see it on, your Honor.

The Witness: What happens is that this is what is called the warp. The warp, as you are, I am sure, aware, your Honor, are the strands of elastic as they are being woven on the machine. Through the warp comes the shuttle filling it in and out with threads on it. That is called the fill. Obviously, the warp is the one that is firmer because it is composed of strands of elastic or elasticized threads. So nor-

mally you put the warp on the part which you want to have most control, in other words, around.

If you kindly notice, this pull is much firmer and it has a quicker comeback than this one, which is almost lazy. You can see it without even touching it. Therefore I figured that the combination of the two—in other words, to answer the question, even though they might appear the same, they stretch differently.

The Court: What is "they"?

The Witness: Those two panels, the one underneath and the one on top.

(399) Your question was whether they are different in size.

Mr. White: You have to see it on, your Honor, hopefully with a girl with a bulging tummy.

The Court: Are you telling me that the bodyencircling element is of a different material on the outer panel?

The Witness: No, no, it is the same material, except—

The Court: The warp goes-

The Witness: The warp goes around on the body, whereas it goes up and down in the front panel, and by creating the two-way friction, one against another, it causes the flattening action.

The Court: I think I understand your testimony that due to these factors we have been talking about this piece over the crotch will be somewhat looser if the garment is on right.

The Witness: That's correct.

The Court: In other words, if this is loosened, then that means around the leg it is a little looser? The Witness: Pressure.

The Court: What are we talking about, pressure (400) on the crotch or pressure on the legs?

The Witness: No, pressure on the crotch in this particular case.

The Court: I thought the problem with those other briefs was pressure around the legs.

The Witness: This is the crucial part. This is the crucial part which can make or ruin the garment.

By Mr. White:

Q. Is that the groin? A. It is right in the groin. It is a great art—I don't want to sound conceited and please don't take me this way. However, it is a great art to be able to achieve the cupping of the garment under the buttocks so that it won't slip up and be uncomfortable, and at the same time the looseness in the front so that it won't cut in. Because it is very easy to take something tight and put it around it and make sure that it stays on the body, but then it hurts.

The Court: Let me make sure I am clear.

Going back, the problem with the Jantzen brief, for instance you talked about comfort. Was that pressure on the groin or pressure around the legs or what?

Mr. White: This is the garment. The Witness: Oh, this particular one.

(401) Yes, this was the point of pressure in all of them (indicating).

The Court: That would hurt the crotch or the groin?

The Witness: That is a very vulnerable spot, yes.

The Court: You are not talking about just hurting around the legs?

The Court: You are talking about what?

Mr. White: 26, 40-6.

Q. Why would anybody want to wear garters with Exhibit 16? (403) A. In my opinion, the garters were worn only in the case of a need for support for hose, because it was perfectly comfortable without it.

Q. Mrs. Erteszek, is the function of Exhibit 16 dependent on having the warp threads arranged perpendicularly to each other in respect of the panel and the underlying

portion? A. Yes, it is.

Q. It must have it that way. A. It must have it that way.

Q. Otherwise it will not work. A. It might work, but not as well, no.

Q. I am not asking you as well. A. No, it wouldn't work.

Q. At all. A. No.

The Court: Can I have Exhibit 23, please, and also Defendant's Exhibit A.

All right. Go ahead, Mr. White.

Mr. White: Your Honor, I have encountered something somewhat unexpected and I would like at this time, without objection, if I can do so, to amend my specification of claims in issue in regard of the 300 patent to include claim No. 3.

(404) The thing is that neither claim 1 or claim 2 expressly requires that these elastic threads be arranged perpendicularly of each other. In fact, the infringement has them that way, as does the older garment, and I must say the significance of that detail had escaped me until I heard Mrs. Erteszak's testimony.

The patent does teach or describe in column 2 that the garment is shown to be made in practical effect of elastic fabric 11 having its elastic—

The Witness: No. This is a question of fit. Some fit better; some fit worse. But the vulnerable spot is right through here (indicating).

By Mr. White:

Q. Mrs. Erteszek, may I see Exhibit 16 a moment?

If this is worn by a woman with a bulge in the abdomen, is the outer panel pulling slightly outwardly from the bottom of the crotch. That may be an exaggeration, but it is pulling not exactly parallel with the inset, is it? A. That is the purpose of it, so that it pulls flatly to this point and then it releases from the point of attachment so that it is comfortable.

Q. Did you know of any brief or girdle-type garment which had built into it any such idea of relieving the pressure on the groin as achieved by Exhibit 16? (402) A. Absolutely not.

Q. We had a lot of testimony about the significance of making the garters attached or detachable, Mrs. Erteszek. Why would one want to detach garters from any garment? Is it only because you don't want to hold up stockings?

I am not asking this question right. A. You answered it already.

Q. Look at Exhibit 26 a moment, Mrs. Erteszek. Do you notice that this brief has garters attached to it? A. Yes.

Q. Garter straps, is that what you call those? A. Garters. They are what we call detachable garters.

Q. They are detachable. Why would one want to wear garters with Exhibit 26? A. Twofold. One, because the wearer wants to wear hose and therefore support the hose; and, secondly, that the garment was so uncomfortable that the pull on the garter would relieve somewhat the digging into the groin.

The Court: Where are you reading?

Mr. White: Column 2 of the 300 patent, which is Exhibit 1, line 7.

The Court: Exhibit 3.

Mr. White: Exhibit 3, line 7 of column 2.

The Court: You mean the sentence beginning "As illustrated . . . "?

Mr. White: Yes, your Honor.

Then if you contrast where it talks about the elastic threads on the panel, that is at line 25 of column 2.

The Court: You want to rely on claim 3?

Mr. White: Yes, because that specifies that that must be so.

The Court: Any objection, Mr. Taylor?

(405) Mr. Taylor: I would like to have an opportunity, of course, your Honor. I wrote my brief on their selection of claims so this is the first time I had an opportunity—

The Court: You will have an opportunity. You want an opportunity to write an additional memo if you think it is necessary?

Mr. Taylor: I might even ask for a witness to be be called.

The Court: All right.

Mr. White: I am awfully sorry, your Honor.

The Court: So subject to Mr. Taylor's reservation of right to introduce more evidence and an additional memorandum, that amendment is granted.

All right, Mr. White.

Mr. White: I must apologize.

By Mr. White:

Q. Mrs. Erteszek, just so the point will be nailed down, does this garment work at all if you don't have the threads

running in opposite directions, Exhibit 16? A. I don't recall making it the other way. The proof of it would be in testing it.

Q. You always made it and sold it with the (406) elastic threads aimed in perpendicular directions? A. That was my intention, yes.

The Court: What you are relying on, then, is claims 1 and 2 of the 301 patent, right?

Mr. White: 1, 2 and 3 of that patent 300.

Mr. Taylor: You are referring now to 300 or 301? Mr. White: 300. I was only before relying on claims 1 and 3, your Honor.

The Court: I am looking at your trial brief, page 2:

"For the purposes of the trial, the defendant relies upon claims 1 and 2 of the 301 patent and claim 1 of the 300 patent."

You have now asked to amend that to indicate that you want to rely on claim of the 300 patent?

Mr. White: That is correct, your Honor.

Mr. Taylor: Just claim 3?

Mr. White: Mr. Coch is pulling my sleeve to rely on claim 2, so let me read that.

The Court: Let us get it set.

Mr. White: No, I don't think claim 2 adds anything to it. I want to get in the feature of the direction of the threads, which is claim 3.

(407) Mr. Taylor: So you are relying on claim 3 and not 1?

Mr. White: I don't even need to rely on claim 1 if it simplifies the case, your Honor. We will be relying on only claim 3, because claim 3 is dependent. In other words, claim 3 has everything that claim 1 has in it, plus that added feature. That is the point of it.

The Court: It doesn't help to take out claim because claim 1 is incorporated in claim 3.

So it is claims 1 and 3 of the 300 patent. All

right.

Mr. White: Thank you, your Honor. Again, as I say, I hadn't appreciated the significance of that point.

The Court: Go ahead.

By Mr. White:

Q. Mrs. Erteszek, would you look now at Exhibit 19? Exhibit 19 is a garment similar to Exhibit 15, but with the panel sewn underneath instead of on top of the skirt portion of the garment.

Do you have those two exhibits in front of you, 19

and 15? (408) A. Yes, I do.

Q. At any time in your development of this garment which is the subject of this suit did you try out any ex-

amples similar to Exhibit 19? A. No, I haven't.

Q. Mrs. Erteszek, I believe while being cross-examined by Mr. Taylor you testified that you had made garments similar to Exhibit 19. Do you recall testifying to that effect? A. Yes, I do. I was mixed up. I misunderstood this question.

Q. Are you sure that you at no time contemplated manufacture of a garment like Exhibit 19? A. I'm positive. It

wouldn't make any sense.

Q. Would you explain why? A. Because the garment would ride up, there wouldn't be any—a brief of any kind is considered a garment to be worn under a close fitting outer garment like pants, shorts or the like. This wouldn't work because there would still be the skirt which would be objectionable. It wouldn't have the smooth line that you are after in a brief.

Q. So you at any rate did not make any or test any like 19? (409) A. No, I haven't.

Mr. White: That's all. You may inquire.

The Court: Do you have any memory of the processes you went through to develop putting this crotch piece in?

The Witness: I couldn't relate it step by step, your Honor. You understand, it's been quite a few years.

The only thing that I recollect that I made the bottom part completely of elastic and it has proven—in one of my attempts. In other words, the inner panel—

The Court: You made the inner panel of elastic?

The Witness: Yes, the continuation of it.

The Court: In other words, in making models?

The Witness: In the development of it.

The Court: You tried the elastic?

The Witness: Yes.

The Court: How did that work out?

The Witness: It did not. It was still too confining at this point of the groin.

The Court: How did you get the idea of having the inside crotch piece would relieve the pressure on the groin?

(410) The Witness: The tricot particularly you are asking about?

The Court: Yes.

The Witness: Out of knowledge that tricot is not restrictive enough.

The Court: I am not talking about the material. We were talking about sort of a design concept, if you will, of having the outside panel pull up and cause this loosening of the inside member.

The Witness: Yes.

The Court: Did you do drawings or measurements or analysis? What did you do to figure that out?

The Witness: Some people figure out a Moonlight Sonata. I happen to be good in visualizing things of this kind.

The Court: I would like to see Exhibit 23.

I want to know if that would do the same thing. This is the alleged infringing garment, Vanity Fair. Would this do the—

The Witness: If it is done identically it would.

I would say without testing it that what they call the triple panel would be somewhat of a deterrent to it.

(411) The Court: A deterrent to what? The Witness: To the flattening part.

Are you asking about the crotch?

The Court: I am asking about the crotch, right. The Witness: There isn't quite as much of an ease of stretch and relief in this one on account of the double panel on the inside as it is in my garment.

This is where the whole secret lies in the softness

of this part, underneath part.

Mr. White: I think for the record I might just point out that the inner crotch piece in Exhibit 23 is obviously not of the same fabric as the other elements.

The Court: On the Rosenthal item, is there any of the action that you have described with respect to 16? That is Exhibit A.

The Witness: I am sorry, your Honor, I really fail to see any connection between this garment and mine.

The Court: As far as the action of loosening up

this pressure on the groin. Is there any of that effect there?

The Witness: There is actually no talking about—there is no point of—I'm sorry, I am trying (412) to explain as best I can.

There is no leg per se over here. There is a garter belt, which is loose in the front, it is loose in the back, and there is just a piece of fabric attached to it. So comparing a garter belt with a pantygirdle or with a brief, I don't see it.

If it were something on this order, then there would be more of a similarity than this (indicating).

The Court: All right, Mr. White, any more questions?

Mr. White: No, I have none.

The Court: Mr. Taylor?

Mr. Taylor: I move to draw attention of the Court that there has been no proof whatsoever offered by taking the claims and applying them to the accused garment, which, of course, is one of the most important steps in establish infringement. I merely call that to your Honor's attention because it puts me at a tremendous disadvantage as to knowing how to fit in any of these misremarks that have been made in the course of this testimony with respect to the claim language per se. So that I think either I will ask your Honor to strike the entire deposition or else to have Mr. White proceed at once with an application of the claims to the 40-28 garment (413) complained of infringing.

Mr. White: I will do it. I was going to anyway. Let us put Exhibit 23 on the Wolf form.

Do you have any cross examination of Mrs. Erteszek?

Mr. Taylor: I will have.

Mr. White: Proceed with that.

Mr. Taylor: No, no. I am going to move to strike the deposition unless you completely give me the opportunity of cross examination of this witness who purportedly and in accordance with your trial brief—

The Court: Couldn't you finish your examination on all issues?

Mr. White: Let me ask Mr. Taylor. I am through.

Mr. Taylor, is there any respect in which a lay person cannot comprehend claim 1?

Mr. Taylor: Oh, yes.

You see, if your Honor please, a lot of this testimony depends on what material you use. That is just not within the purview of a claim interpretation, unless it produces some totally unexpected function, and here, of course, we have admitted just in the last few ques- (414) tions that the material of the 40-28 of Vanity Fair produces quite a different action under the circumstances than that of the Olga 446.

Mr. White: That makes us even, Mr. Taylor, because you gave me no notice of such contention prior to this moment.

The Court: Why don't you finish your examination on infringement?

Mr. White: You don't have to ask a witness to do this, and, in fact, many judges think it is improper, so I am now going to read this claim and tell you my contents as to what elements of that garment respond to each of these things.

Mr. Taylor: It is very nice to have counsel take the responsibility, but I do think in view of the explanations of this witness, whose testimony indi-

cates that it depends wholly on the manner and use of the fabrics, that therefore I think that we ought to have—

The Court: I don't think that is what she said.

Mr. Taylor: It is very close to that.
The Court: It doesn't even seem close.

Mr. White: I want to explain-

The Court: You finish.

-(415) Mr. White: Mrs. Erteszek: your Honor, is going to get confused if I start throwing at her clauses from this patent claim, and rightly so.

The Court: Can either one of you explain what you are driving at at this point?

Mr. White: I will, your Honor.

Your Honor realizes that in a patent case what you do to prove infringement is you take that claim from the patent, the claim in this case of Exhibit 3, which is claim 1 and claim 3 now, and you have to find in Exhibit 23, which is the Vanity Fair garment—you have to find in Exhibit 23 something which responds or corresponds, may I say, to each of the different elements set out in claim 1 and claim 3. That is how you go about establishing infringement of a patent.

You don't compare the garment of the infringer

with the commercial garment of the patent.

The Court: It seems to me—and I can stand easily corrected—but it seems to me this is a situation where Mr. White has to use his judgment if he needs any additional proof. If he feels that all or part of the claims in the patent are clear enough so that the Court can compare that language with the alleged infringing garment, I think then he will take that much of a risk. (416) That is up to him. If he feels that he should have the matter explained by

testimony of Mrs. Erteszek or an expert or whoever, then he can do that.

I think it is really up to him what proof he wants to put on and I will leave it at that. If you want to cross examine or have redirect on that or any other subject, why, you are free to do so.

Mr. White: That is correct.

Mr. Taylor: I would like to move the Court then at this point to strike the deposition—

The Court: You mean the whole testimony?

Mr. Taylor: The whole testimony, yes, because it doesn't accompany in any manner the application of the claims upon which the Olga Company relies.

Mr. White: Mrs. Erteszek is not a patent lawyer. The Court: The motion is denied.

The testimony was, at least a substantial extent, on the subject of the question of invention, and that goes to the validity of the patent. The testimony about how Mrs. Erteszek developed these two garments or the designs for the garments is relevant, it seems to me, to the question of whether there is or is not a patentable invention. The whole testimony she gave, it seems (417) to me, is relevant on that issue. It cannot be stricken under any circumstances.

Whether it is sufficient on the question of infringement, that is another matter for Mr. White to decide if he wants to rest with that or if he wants to ask more questions.

Mr. Taylor: You also have the responsibility to determine validity and therefore the fact is that you must under 103 compare the prior art disclosure with the subject matter of the claims. Otherwise you do not comply with Deer, as your Honor has read from my memorandum.

The Court: We have gone into that subject extensively all through the trial, have we not? You have introduced what you claim, as the plaintiff, to represent the prior art.

Mr. Taylor: And I did it, if your Honor will recall, by reference to the claim language itself. I went element by element with Mr. Lands with respect to the prior art as against the language of the claim itself, and I have repeated that in my brief.

Mr. White: Mr. Taylor, you know that wasn't even proper testimony. I just didn't happen to want to object.

The only time you can do that with a witness, (418) your Honor, is by laying the foundation that there is some technical language or phrases in the patent that need interpretation to the lay judge. It means absolutely nothing. The Court can't delegate its job of comparing prior art patents and claims and accused infringing devices with claims by delegating that to certain witnesses. In the end that is the \$64 question and the only legitimate function of an expert in this inquiry is to interpret and make clear to the Court, which obviously is a lay person in the sense here, the meaning of expressions and words which it couldn't understand.

There is nothing in this patent which any lay person can't understand, particularly after four days of testimony, and it would be an absolute waste of time for me to have Mrs. Erteszek, who is not a patent lawyer, sit there and say, "yes" and "No" to these questions: "Do you find in this garment a torso-encircling portion? Do you find in this garment a crotch portion? Do you find in this garment a panel?" and so on and so forth.

The Court: What you are suggesting, Mr. Taylor,

is that these prior patents should be gone through one by one and have someone from the defense explain in what way the defendant's patents are not anticipated, is that right?

(419) Mr. Taylor: It isn't quite that, because it is the kind of a reverse of it because the burden is on me as a declaratory judgment plaintiff seeking a judgment of invalidity and noninfringement to consider both aspects of that provision.

The Court: You had your witness go through

and do that.

Mr. Taylor: In great detail.

The Court: In great detail, and the thing that puzzles me is your suggestion that Mrs. Erteszek's testimony is incomplete. I am trying to get from you what you think there should be that she hasn't testified to. You are saying her testimony should be stricken because there is some essential element missing, aren't you?

Mr. Taylor: Yes, I am.

The Court: What is the essential element that is

missing?

Mr. Taylor: The essential element is to relate this very elaborate explanation which is dependent on the nature of the fabric to the claims of the patent. I am sure your Honor realizes that you cannot change a claim by utilizing a fabric that has a one-way stretch as compared to a two-way stretch because those things are all old.

(420) Mr. White: Show me the language you

want me to ask her about.

Mr. Taylor: I am not going to do it.

The Court: What is it?

Mr. Taylor: You in your own questioning-

The Court: What is the language in one of these

patents that you are referring to that either does or does not described the method of stretch?

Mr. Taylor: In the first instance, turning now to claim 1 of patent 300—

Mr. White: That is at column 2, beginning at line 62, your Honor.

Mr. Taylor: That's right.

On column 2 of page 1 there is no limitation whatsoever expressed in the provisions that I read in respect of the nature of the material that has to be used in the several separate elements.

Mr. White: What does that mean?
The Court: Just a moment, Mr. White.
But it does say an elastic fabric, right.

Mr. Taylor: Yes.

The Court: Elastic material? Mr. Taylor: That is about all.

The Court: Then the reference to the crotch (421) portion does not say elastic.

Mr. Taylor: No, it does not say anything.

The Court: There is a statement the leg openings are elastic, adapted to elastically fit the wearer.

It says a flexible crotch piece.

Mr. Taylor: Yes. Yes. But, you see, I think that in one of the answers that you elicited from Mrs. Erteszek she said that it wouldn't work if you had the material in any other arrangement than was dependent upon the warp, as I recall her testimony.

The Court: She said that the warp—this was a question of Mr. White's. She said that the warp, for the success of her garment the warp on the body piece should be horizontal and the warp on the outside panel should be vertical. That's what the claim 3 is talking about.

Mr. Taylor: Yes. But she said it wouldn't work at all if you make it of any other material.

The Court: I don't think she did say that.

Mr. Taylor: That is my recollection. Mr. White: No, she didn't say that.

The Court: She was talking about the direction of the warps.

Let's clear it up. Were you talking about (422) the directions of the warps?

The Witness: Definitely.

Mr. White: The elastic threads?

The Witness: Definitely. I was even explaining how it goes on the machine.

Mr. Taylor: What was it that you said it would not work at all because that is what my notes say?

The Court: I think the thing to do is to see if Mr. White is finished and then have you engage in cross examination. Isn't that the proper format?

Mr. Taylor: Yes. But I have an additional— The Court: Mr. White are you finished with your

examination?

Mr. White: I am, your Honor, but I have a little speech to make.

The Court: I think we better finish the testimony.

Mr. White: I am through with this witness.

The Court: All right, Mr. Taylor.

Mr. Taylor: I was going to ask, your Honor, I haven't made any plans to answer with respect to claim so I will need some time in order to review my reasons for objecting to that, and also to write a brief with respect to the infringement, because I haven't covered with my wit- (423) nesses anything having to do with claim 3 of the patent.

Mr. White: I will so concede, your Honor, that this comes at a very late moment.

But may I say that at a period-

The Court: Are you saying that you are not prepared to conduct redirect of Mrs. Erteszak because of the amendment to include claim 3?

Mr. Taylor: I am not, indeed.

The Court: You can't even go ahead on any subject with Mrs. Erteszek?

Mr. Taylor: It would only be a waste of time, if your Honor please, because I haven't any organized notes or preparation for this purpose.

The Court: All right.

Mr. White: Do you want us to bring her clear back here to cross examine her? That is paying a steep price for a last-minute change, but I can't avoid it, your Honor.

Mr. Taylor: I don't want to be unnecessarily harsh in any way, but I do think that this is a very late time to burden me with an additional problem.

Mr. White: I want to say something right now. Mr. Taylor: Go ahead.

(424) Mr. White: At a time in this case when there had been no restriction of any kind made with respect to what claim or claims we were going to single out, in an effort to simplify the case we asked Mr. Taylor in an interrogatory to specify the construction of the ladies' undergarment sold by the plaintiff which cause it not to infringe each of the claims of each patent in suit, that being interrogatory 11.

Then in reply to that question he comes back saying, "The construction of ladies' undergarments, Vanity Fair Style 40-28 brief, which cause it not to infringe each of the claims of Olga patents 300 and 301, as alleged in the complaint paragraph 7, is that it is substantially that of Rosenthal patent 008 with

the front panel overlaying the body portion as in the brief illustrated and described in Lehr patent 571."

That was the basis of his contention of non-

infringement.

Your Honor has heard me ask Mr. Taylor no less than three times in this trial to concede that if the patent is valid he infringes on it, and he says no because it so invalid we don't even want to dare to make such a concession arguendo as that.

I can't honestly think that it is quite completely (425) in good faith for him now to say that he is unprepared even to cross examine on any score this witness and that we should bring her back for that

purpose, but I will certainly admit-

The Court: What I was hoping to do, Mr. Taylor, was this: Mr. White acknowledged that he was making an amendment to his contentions in this case by including this claim 3 and I permitted the amendment, subject to your right to introduce new testimony and an additional briefing on the facts and law. But what I was hoping to do was to finish everything today that we had contemplated doing before that amendment; then give you a day or so to let us know if you wanted additional evidence, and you might not. You might or might not.

Mr. Taylor: That is very true and that is the

reason why-

The Court: What I think we ought to do, we are approaching 5 o'clock. I don't think that the wheels of progress today ought to be stopped. I think we ought to go forward.

Let us assume claim 3 had not been injected into this case, let us finish the case on the other phases of the case which we ought to do today, if we can now proceed, and then I will give you 48 hours, or

whatever you need, (426) to let me know if you want to introduce additional evidence. But let us go ahead.

Let us assume Mr. White had not put in claim 3 into the case, where would you stand now? Would you have any redirect?

Mr. Taylor: Under the circumstances as you put it, and I am not going to make myself an obstreperous person by saying I want Mrs. Erteszek back, I am going to rest. I am going to rest and I am going to make the reservation of objection that I have stated to your Honor, that he has not proven infringement by reference to the claim language, and that is that.

The Court: All right. You have no redirect?

Mr. Taylor: I have no redirect.

The Court: Do you have any other evidence, Mr. White?

Mr. White: Your Honor, Mr. Taylor has said on two or three other occasions that this Olga invention is, as he puts it somewhat indelicately, a dead cat, and he has said on three occasions that even the plaintiff has stopped selling its garment and just keeps it in its catalog just as a pretense of continued success.

To rebut that and to show on the contrary, far from that being the case, this is one of those (427) rate garments that Mr. Hoopes explained is really exceptional and indicates invention by its longevity, because, as your Honor will recall, Mr. Hoopes said that if you have something—

The Court: Can't we introduce evidence and have the argument later?

Mr. White: I offer in evidence a chart of a summary of sales in units and dollars. The units are

Olga Erteszek-For Defendant-Cross.

not dozens, they are actually single units of Olga garment 446 for the years 1963 through 1972, inclusive. The dollars, of course, are not retail but wholesale. I think that goes without saying.

The Court: Why don't you have it marked and

see if there is any objection.

Mr. Taylor: I have no objection and I told Mr. White that if he would produce a document which stated that it represented the ordinary business entries of the company, why I would have no objection.

As far as the dead cat is concerned—Mr. White: Let us put it in evidence.

The Court: Let us complete the evidence.

(Defendant's Exhibit F was received in evidence.)

Mr. Taylor: In view of Mr. White's statement, (428) I have some questions which I think ought to be answered.

The Court: Who do you want to question?

Mr. Taylor: Mrs. Ertsezek, because it has to do with the catalog of the Olga Company for the spring of 1972.

The Court: Why don't you question her.

Mr. Taylor: Yes, I will.

Cross Examination by Mr. Taylor:

Q. Mrs. Erteszek, I exhibit to you a document which is here identified as Plaintiff's Exhibit 31.

Is that a recent catalog of the Olga garments? A. Yes. Well, reasonably so.

Q. Is there a later one? This is spring of 1972. A. Yes. There certainly is a later one.

Mr. White: Here is a year later if you want it. I don't know what you are going to do with it (handing).

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The Court: Is 446 based on patent 300?

Mr. White: Everything is 300, yes, your Honor.

Q. Mrs. Erteszek, I show you pages 10 and 11 of the Olga spring, 1972, catalog, Plaintiff's Exhibit 31, and (429) I will ask you to state whether or not the two garments at the center of the catalog page, one numbered 446 and the other 447, coupled with a recital of patent Nos. 3,142,300 and 3,142,301, are the 446 garments that we have been discussing at this trial?

Mr. White: You want to know if the 446 and 447 are 446?

Mr. Taylor: Yes, both of them, because if you look you will see—

Mr. White: May I explain the chart? The Court: Let him question the witness.

A. May I ask what-

Mr. Taylor: If the Court please, I asked Mrs. Erteszek a very simple question.

Q. Are the two garments at the middle of the page which I have identified the 446 garment which we have been discussing at this trial? Yes or no. A. No.

Q. What is the difference? A. The first one is the original garment, the second—

Q. When you say the first one, please locate it on the page. A. 446.

(430) The Court: What page is that?

Mr. Taylor: 10 and 11.

The Witness: This is the original garment which we were discussing.

The second one was a further development on the same principle, except there was a raw rubber in-

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serted on the inside of it in order for it to stick to the pantyhose so that it won't slide up when worn without the grips, without garters on the pantyhose.

Q. But they are both designated as being constructed in accordance with both the patents 301 and 300, are they not? A. It is clear.

Mr. White: It is clear. I so stipulated.

The Court: It is in the document.

Mr. Taylor: I read it to Mrs. Erteszek.

The Court: What else?

By Mr. Taylor:

Q. Heretofore 447 number style was reserved for the girdle, was it not? A. The girdle has been off the market for a long time.

Q. But the answer to my question is that the 447 style was to designate originally the girdle, is that (431) correct?

A. Originally, that's correct.

Q. I notice in the heading for the 447 modification which you now just described that it is said to be garterless. Why is that, Mrs. Erteszek? A. Because there is no way to attach a garter to a pantyhose, if you are aware of what a pantyhose looks like.

A pantyhose is a nylon stock which goes all the way to

the waistline incorporating the panty part.

Q. Of course, I am sure you will agree with me if you can attach a garter support to a leotard you can attach it to a pantyhose? A. No.

The Court: You wouldn't do it. There would be no need.

Mr. Taylor: That's right.

Olga Erteszek—For Defendant—Cross.

A. You won't wear it.

The Court: What else do you have, Mr. Taylor?

Q. Why the emphasis on garterless?

The Court: She has already explained. That has been asked and answered. Let us go on.

Q. Are there any provisions for garters on the 446, (432) on that same page? A. I don't know what it says over there.

Mr. White: Can you see it in the picture?

Mr. Taylor: Yes, sure.

Mr. White: She is looking for it.

A. Yes. It says for detachable garters.

Mr. White: I think the Court can use his eyes.

The Court: It says that, Mr. Taylor.

Mr. Taylor: Yes.

The Court: What else?

Q. Mrs. Erteszek, has the Olga style so-called wonder pants supplanted or substituted for the 446 garment? A. Not at all.

The Court: What are the wonder pants?

Mr. Taylor: The wonder pants are disclosed at page 9 of Exhibit 31, at the portion marked "Style 409."

Q. Is that correct? A. That's right.

Mr. White: I object to any further questioning about a 1972 garment, your Honor, as irrelevant to any issue in the case.

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(433) The Court: I will allow it. What is your question?

Q. The question is this: I notice that there is no application of the two patent numbers, 300 and 301, in connection with the wonder pants. Do they embody in any way the subject matter of the patents 300 and 301?

Mr. White: She is not qualified to answer that, your Honor. That is a patent lawyer's job.

The Court: Just a moment. If she can answer it, fine. If she can't she can just say so.

Do you understand the question?

The Witness: I understand the question, but I am sure this is a fine point of law which I cannot answer.

Mr. White: Do you contend, Mr. Taylor, that they do embody the patent?

Mr. Taylor: No, I don't know. That's the reason I asked the question.

The Court: What else do you have?

Mr. Taylor: I don't have anything more, except
I would like to have the opportunity—

The Court: You certainly will.

Mr. White: On the exhibit, your Honor, which (434) started this, my last one on my chart of the figures, but let it be said that we were conservative, because for some years past—

The Court: Mr. White, if you have any questions of the witness-

Mr. White: None.

The Court: Do you have any further questions of

Mr. Erteszek, Mr. Taylor?
Mr. Taylor: No, I haven't.
The Court: Mr. White?

Louis J. Bachand-For Defendant-Direct.

Mr. White: None.

The Court: Do you have any further evidence,

Mr. White?

Mr. White: One witness for two questions.

(Witness excused.)

Louis J. Bachand, called as a witness by defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. White:

Q. Mr. Bachand, you are an attorney, are you not? A. Yes.

Q. You practice in Pasadena, California? (435) A. Yes.

Q. And your firm is known as White & Bachand? A. White, Haefliger & Bachand.

Q. And does your firm represent the defendant in this case? A. In patent matters and trademark matters, yes.

Q. And does that include assistance in the preparation and negotiation of patent license agreements? A. Yes, it does.

Q. Did your firm negotiate or have any part in the negotiation of a license agreement under the patents in suit? A. They were invloved in the negotiation of a license.

Q. Under the patents here in suit? A. With respect to Sears, Roebuck & Company.

Q. That was the name of the licensee? A. Yes.

Q. And do you know of any other licenses under the patents in suit? A. No.

Q. Tell us what the royalty rate was as specified in the Sears, Roebuck license? A. Five per cent of net purchase price.

Louis J. Bachand-For Defendant-Cross.

(436) Q. Does that mean the price paid by Sears? A. To its supplier, yes.

The Court: Paid by Sears to its supplier? The Witness: Yes, sir.

Q. Mr. Bachand, did that Sears, Roebuck license grant Sears the right to resell at wholesale these garments or just in its own stores? A. It was for the purpose of retailing garments falling within these patents in suit.

Q. In Sears, Roebuck stores? A. Yes, sir.

Mr. White: That's all.

Cross Examination by Mr. Taylor:

Q. What was the date of the license, Mr. Bachand? A. December 28, 1964.

Q. Is it still in existence? A. Yes, sir.

Q. And can you tell me by looking at the figures which are here—

Mr. White: They are not included, because he didn't prepare that chart.

The Court: Do you want Exhibit F?

Mr. White: Yes.

(437) Q. Were any of the Sears, Roebuck garments included within the sales of Olga Garment 446 by Olga to Sears in this sheet which is here as Defendant's Exhibit F, if you know. A. Olga has not sold garments to Sears. There was a license granted so that Sears might procure garments manufactured elsewhere according to the styles claimed in the patents in suit.

Q. And do you know the names of the manufacturer from

Louis J. Bachand-For Defendant-Cross.

which Sears procures its garments as you explained? A. I do not know, sir.

Q. Was there any limitation in the Sears license agreement that you say you took part in negotiation that would indicate the manufacturer? A. No, sir.

Q. Have you got a copy of the license with you? A. No, sir.

Mr. Taylor: I ask Mr. White to produce a copy of the license.

Mr. White: We shall if the Court orders us.

The Court: I thought we were finishing the trial on everything today except the amended reference to claim 3.

(438) Mr. Taylor: I didn't know about this.

Mr. White: We are proving damage, your Honor. The Court: This is Mr. White's proof on damages and he has put on testimony about the license and the license fee, but it is not discovery, so I am not going to ask him to produce it.

Mr. Taylor: The only thing is that such a license might give a clue to the general arrangement that was made in the license itself aside from the terms.

The Court: Did you know about the license with Sears before today?

Mr. Taylor: My, no. The first time I heard about it was when Mr. White-

Mr. White: I am trying to cooperate with the Court.

The Court: In view of the fact that I require or I requested the fact that a little bit of a premature handling of the damage issue, I think I will ask you to produce the license agreement.

Mr. White: We shall do so.

The Court: Then, Mr. Taylor, that will be something that you can—

Mr. Taylor: Consider.

(439) The Court: You can indicate whether you want to have any additional hearing on any issue raised by that.

Mr. White: Fine.

The Court: Mr. White, do you have any other questions of Mr. Bachand?

Mr. White: I have no other questions of Mr. Bachand.

Mr. Taylor: I have no further questions.

(Witness excused.)

Mr. White: I wish to call Mr. Carter, your Honor. I have one more witness.

Paul Carter, called as a witness by defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. White:

Q. Mr. Carter, you are employed by the defendant in this case? A. Yes.

Q. In what capacity? A. At the present time I'm vice president in charge of merchandising.

Q. And for how long have you been in that position? (440) A. Two years.

Q. And what were you before then? A. Ten years previous to that I was the eastern regional sales manager, and at the same time served the key Department Stores in New York, Boston and Philadelphia.

Q. Are you familiar with Olga's Model 446 pantybrief? A. Yes, sir.

Q. And at my request have you made an investigation

within your company of the amount of profit which Olga Company, the defendant, has made on the 446 model briefs that it has been selling over the past eight years? A. Yes, sir.

- Q. Would you please state for the record how much that profit is and on what basis it is calculated? A. It is calculated at 18.2 per cent.
- Q. On what basis? Of what? A. Of the total wholesale cost of the garment.
- Q. Cost to the buyer? A. Cost to the buyer, that's correct.
- Q. So what you mean is it is 18.2 per cent of Olga's sale price? A. That's correct.
- Q. At what prices has Olga sold its 446 garment (441) since 1964? A. When we originally brought it out it was \$48 a dozen and it is now \$51 a dozen.
- Q. When was that change made? A. About two years ago, possibly three. I'm not sure of the exact date. About two or three years ago.
- Q. Are you familiar with the advent on the market of the Vanity Fair 40-28 garment? A. Yes, I am.
- Q. Do you recall when it appeared? A. The dates that I heard here in the court were consistent with my judgment. I would say if they said '67 or '68, that would be about right.
- Q. And would Olga have been in a position to supply its 446 garment to those consumers, who bought Vanity Fair's 40-28 garment? A. Very definitely.

Mr. Taylor: If your Honor please, I object to that. I don't see how this witness can speculate on that point.

Mr. White: I don't think it is speculation.

The Court: You can cross examine. Objection overruled.

(442) Q. I mean in terms of plant capacity? A. Very definitely.

Q. And you, of course, have read and considered the statement in evidence of Mr. Lands regarding the quantity of 40-28 garments sold by the plaintiff, have you not? A. I saw the figure.

The Court: Is that an exhibit?

Mr. Taylor: Yes, it is an exhibit, I think. It may not be in evidence.

The Court: I think you told us it would be and we don't have it yet.

Mr. Taylor: I stipulated that it would be necessary for Mr. White's purpose.

The Court: Why don't we have a stipulation on the record or just agree that this exhibit does come on that subject. All right?

Mr. Taylor: Yes, quite.

Mr. White: That will be my next exhibit.

The Court: All right, Defendant's Exhibit G received.

(Defendant's Exhibit G was received in evidence.)

Mr. White: That is the exhibit to which (443) the witness just had reference.

Q. At the time of the sale of the Vanity Fair 40-28 garment what companies were supplying the garment which is the subject of the patents in suit? A. Olga, exclusively. There was nobody else who made it.

Q. I have said while Vanity Fair was on the market. A. Oh, while. I am sorry. I thought you said prior to.

Q. No. A. While Vanity Fair? To my knowledge, Olga and Vanity Fair had that business.

Q. How about Sears, Roebuck? A. Well, I heard testimony today about Sears, Roebuck and I knew that we had a license arrangement with Sears, Roebuck and I knew they carried it, but I couldn't say to what degree they did because I myself never went into a Sears store.

Q. Do you regard Vanity Fair and Olga as competitive

with each other? A. Very definitely.

Q. Do you regard Olga as competitive with Sears, Roebuck in the sense that they sell to the same consumers? (444) A. Well, that is difficult to answer. I think my best judgment would be that the consumer who buys an Olga garment in a conventional department store or a conventional specialty store where we sell is not the same consumer who would look for that garment in Sears, Roebuck. But, again, that is really conjecture.

Q. That is conjectural.

But other than Olga, Vanity Fair and Sears, was anybody offering a pantybrief similar to that of the 446 model? A. Not to my knowledge.

Q. When you testified a moment ago that the profit had been 18.2 per cent, was that an average profit over the entire time prior to the present? A. That's the profit at this very moment. Now, if I understand your question, are you saying was it the same percentage a year ago or two years ago?

Q. Yes. A. Of course, costs have gone up and the whole-sale price has not gone up to the same degree. I would have to use my judgment and say that based on garments in our line that are 10 years old, if they are still in the line now we make 18 per cent or 18.2 now. Based on the cost of doing business 10 years ago or even 8 years (445) ago, it was a minimum 25 per cent then.

As a matter of fact, the rule of thumb in our company is we do not add a girdle or a pantygirdle in our line unless we can show a 25 per cent profit.

So at that time, although I was personally not responsible for the costing of the merchandise, the profit was roughly 25 per cent. It goes down as your expenses go up and your wholesale does not go up to the same degree that the expenses do.

Q. Is what you have just said applicable to the years 1966, 1967, 1968? A. Which element of what I just said?

Q. The profit margin that you just said was your best judgment of an earlier point? A. Yes.

Mr. White: That's all.

Mr. Taylor: I have no questions.

The Court: Any further witnesses or evidence, Mr. White?

Mr. White: No, your Honor, the defendant rests.

(Witness excused.)

The Court: Mr. Taylor, do you have any rebuttal case at the preesnt time?

(446) Mr. Taylor: No.

The Court: Mr. Taylor, in view of what we talked about earlier, I would like to say that you can have until 5 o'clock Monday afternoon to let my office and Mr. White know by telephone if you wish to introduce any further evidence, call back any of the witnesses that have already testified or submit any further memorandum.

Mr. Taylor: Was it Monday, your Honor?

The Court: Monday afternoon.

If there is any dispute between you and Mr. White as to the procedure that you want to undertake, why, then you can come in and we can have a meeting and resolve that. I hope there won't be.

Mr. Taylor: I don't contemplate any.

The Court: Let me know and then we will see if we have to schedule any further hearings. Otherwise, the decision is reserved.

Thank you all very much.

Mr. Taylor: Thank you very much.

Do you want posttrial briefs and any—we ordered, at least hopefully, the transcript, but, of course, they have been so busy that it has been impossible and I understand that I am now to get a copy on Monday or thereabouts.

The Court: I think I would like to let you (447) know. If you don't hear from me to the contrary by the end of Monday, you will know I have enough briefs. If there are any points that I need, I will ask you.

Mr. Taylor: Of course, I would like to file a supplemental brief with respect to claim 3. At least that is my present thinking.

The Court: I assume you will.

I will let counsel know by the end of Monday if I need any further briefing or at any subsequent time, but I would like you to let me know by 5 o'clock Monday if you want to submit further briefs or evidence. All right?

Mr. Taylor: I understand.

Mr. White: Are all exhibits to be submitted with the Court?

The Court: Yes.

Court Press Form No. 2-Affidavit.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VANITY FAIR MILLS INC.,

Plaintiff-Appellant,

-against-

OLGA COMPANY (INC.)

Defendant-Appellee.

State of New York, County of New York, City of New York-ss.:

being duly sworn, deposes David F. Wilson and says that he is over the age of 18 years. That on the 2nd copies of the , 19 74, he served two day of July Joint Appendix on Stuart White, Esq. XXX for the Defendant-Appellee the attorney by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorney) Nexxx Island Falls, Maine 04747 No. that being the address designated by him for that purpose upon the preceding papers in this action.

Sworn to before me this

day of July

, 1974.

David & Milson

COURTNEY J. PROWN Notary Public, State of New York
No. 31-547-2920
Qualified in New York County

Commission Expires March 30, 1976

of the mithin APPENDIX is hereby admitted this 2-0 day of Jyly 197%.

Altorney for APPELLEE